AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 396. 134.

GUARANTY SAVINGS BANK, PLAINTIFF IN ERROR,

vs.

ALBERT BLADOW.

IN ERROR TO THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR HIGHLAND COUNTY, STATE OF NORTH DAKOTA.

RECORD FILED SEPTEMBER 12, 1906.
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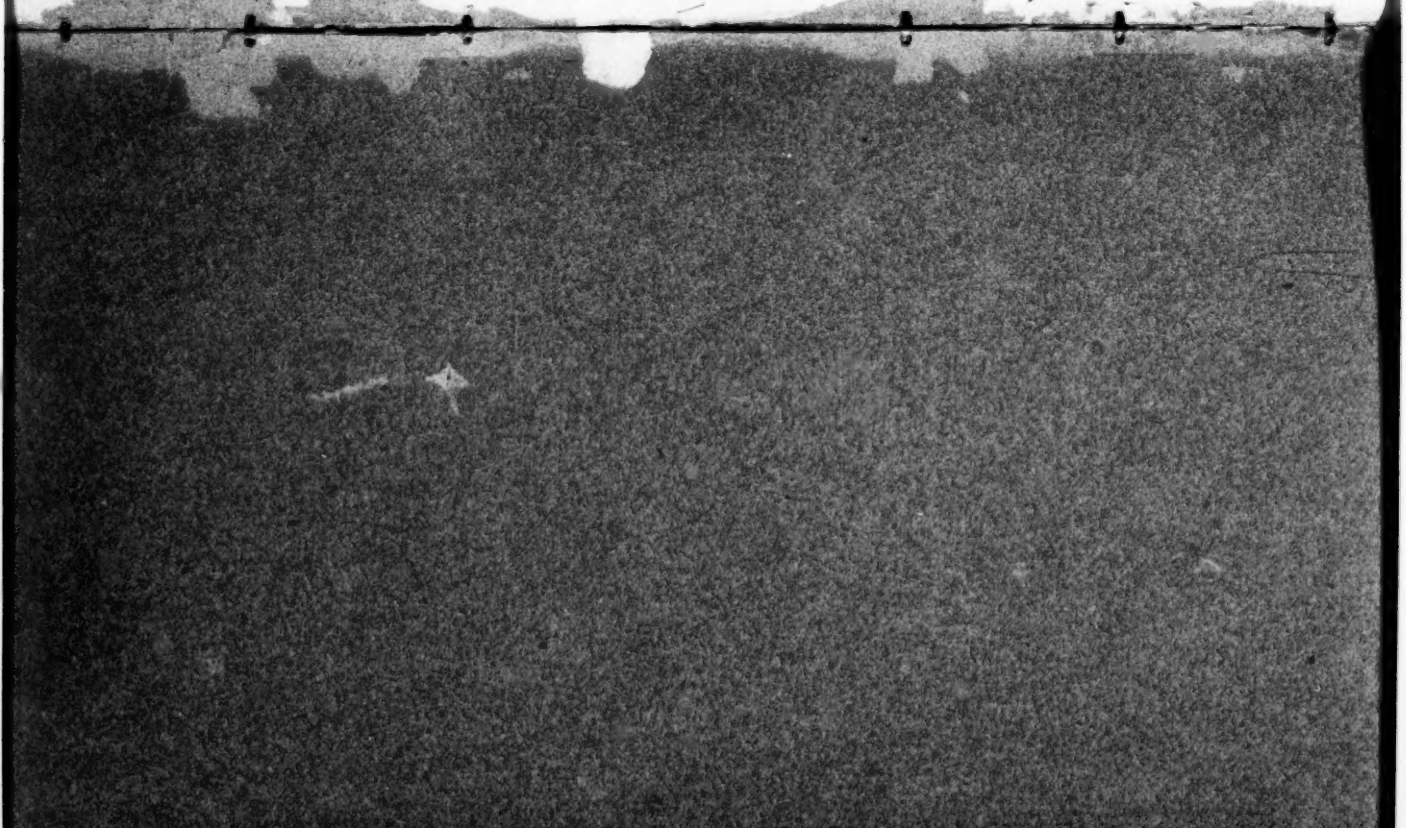
(16,984.)



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(16,984.)

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vs.

ALBERT BLADOW.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1898.

1 In the United States Supreme Court.

THE GUARANTY SAVINGS BANK, Plaintiff in Error,
vs.
ALBERT BLADOW, Defendant in Error.

It is hereby agreed by and between the respective parties, plaintiff and defendant, in the above-entitled action that the material points of the record in said cause necessary to have printed for the consideration of the Supreme Court of the United States on the hearing of the writ of error herein consist of the complaint, answer of defendant Bladow; agreed statement of the facts; the opinion of the supreme court of the State of North Dakota on said appeal; the remittitur sent down with the record in said cause from the supreme court of the State of North Dakota to the district court of Richland county, dated November 10th, 1896; the judgment entered in the district court of Richland county on the 12th day of May, 1898, in obedience to said remittitur, and the assignments of error filed herein with the writ of error by the plaintiff in error. True copies of all of said papers are hereunto annexed for the convenience of the clerk of the Supreme Court of the United States in the printing of said record.

Dated September 5th, 1898.

S. B. PINNEY,
Attorneys for the Plaintiff in Error.
WM. H. STANDISH,
Attorneys for the Defendant in Error.
W. E.

2 In the United States Supreme Court.

THE GUARANTY SAVINGS BANK, Plaintiff in Error,
vs.
ALBERT BLADOW, Defendant in Error.

The Guaranty Savings Bank, as plaintiff, commenced this action in the district court of Richland county, North Dakota, against Charley Anderson, Franklin Hall, and Albert Bladow, and stated its cause of action in the following—

Complaint.

I.

That the plaintiff is a corporation duly organized and existing under the laws of the State of New Hampshire and having its principal place of business in the city of Manchester, in said State.

II.

That on the 20th day of July, 1881, the above-named defendant, Charley Anderson, made, executed, and delivered to H. E. Fletcher,

of Minneapolis, Minnesota, his promissory note in writing, of that date, whereby, on the first day of December, 1886, he promised and agreed to pay to the order of the said H. E. Fletcher, at his office, in the city of Minneapolis, in the State of Minnesota, the sum of four hundred and fifty dollars ($450.00), with interest thereon, at the rate of 12 per cent. per annum, after maturity until paid.

III.

That on the 20th day of July, 1881, the above-named defendant, Charley Anderson, made, executed, and delivered to H. E. Fletcher his certain promissory note in writing, of that date, whereby, on the first day of December, 1886, he promised and agreed to pay to the order of the said H. E. Fletcher, at his office, in Minneapolis, Minnesota, the sum of thirty-six ($36.00) dollars, with interest, at the rate of 12 per cent. per annum, after maturity until paid.

3 IV.

That on the 20th day of July, 1881, the defendant, Charley Anderson, made, executed, and delivered to H. E. Fletcher his certain other promissory note in writing, of that date, whereby, on the first day of December, 1885, he promised and agreed to pay to the order of the said H. E. Fletcher, at his office, in the city of Minneapolis, Minnesota, the sum of thirty-six ($36.00) dollars, with interest, at the rate of 12 per cent. per annum, after maturity until paid.

V.

The said defendant, Charley Anderson, to secure the payment of said promissory notes and interest thereon, as mentioned in said notes, according to the tenor thereof, did, on the 20th day of July, 1881, make, execute, and deliver to said H. E. Fletcher his certain mortgage deed of that date of and upon the following-described real estate, situated in the county of Richland, in the then Territory of Dakota, now State of North Dakota, to wit:

The north half of northeast quarter of section twenty-four (24), township one hundred and thirty-one (131), range fifty (50), and west half of northwest quarter of section nineteen (19), township one hundred and thirty-one (131), range forty-nine (49) west, of the fifth principal meridian.

VI.

That said mortgage was duly filed for record in the office of the register of deeds in and for said county of Richland, in the then Territory of Dakota, now State of North Dakota, on the 25th day of July, 1881, at 11 o'clock in the forenoon, and duly recorded in Book "E" of Mortgages, on page 433.

VII.

That said mortgage was, on the 20th day of June, 1882, for a valuable consideration, duly assigned to the plaintiff by an instrument in writing, dated on said day; which said assignment was filed for

record in the office of the register of deeds in and for Richland county, in the then Territory of Dakota, now State of North Dakota, on the 2nd day of October, 1894, at eleven o'clock in the fore-
4 noon, and duly recorded in Book "N" of Mortgages, on page 211, and the plaintiff is now the owner and holder of the notes and mortgage.

VIII.

That said mortgage contained, among other things, the agreements, conditions, and covenants that if any part of said promissory notes or the interest thereon, as aforesaid, should remain unpaid after the same should become due and payable, or if said defendant, Charley Anderson, failed to comply with any of the agreements or conditions contained in said mortgage, or if said mortgagee or his assigns should fail to pay the taxes levied or assessed against said land, then in such case the said H. E. Fletcher or his assigns might proceed forthwith to collect the same by foreclosure or otherwise.

And it is further provided and agreed by the terms of said mortgage that in case legal proceedings should be commenced for the foreclosure of said mortgage, said H. E. Fletcher or his assigns should be entitled to and might tax with the costs of foreclosure the sum of fifty dollars ($50.00) attorney's fees, in addition to the sum or costs allowed in full by the law, and such mortgage was given to secure the same as part of the debt secured thereby.

IX.

That default has been made in the conditions of said notes and mortgage in this, that said notes were not paid at maturity thereof, or at all, or any part thereof, and said mortgagor failed to pay the sum of thirty-three and seventy-nine one-hundredths dollars ($33.79), taxes levied and assessed against said land for the years 1887, 1888, and 1889; which said sum plaintiff was obliged to pay and did pay on the 14th day of August, 1890, and there is now due and owing the plaintiff from said defendants on said notes and mortgage,
5 according to the terms and conditions thereof, the sum of five hundred twenty-two dollars ($522.00), with interest at the rate of 12 per cent. per annum on four hundred eighty-six — ($486.00) thereof from and since the first day of December, 1886, and interest at the rate of 12 per cent. per annum on thirty-six dollars ($36.00) thereof from and since the first day of December, 1885, and the further sum of thirty-three and seventy-nine one-hundredths dollars ($33.79), taxes paid by said plaintiff, as aforesaid, with interest thereon at the rate of 12 per cent. per annum from and since the 14th day of August, 1890, all according to the terms and conditions of said notes and mortgage.

X.

That there has been no proceedings had at law or otherwise for the recovery of the debt secured by said mortgage, or any part thereof.

XI.

That on the 8th day of May, 1882, said defendant, Charley Anderson, by warranty deed, did on said day convey said above-described land and premises to one R. N. Ink, which said deed was filed for record in the office of the register of deeds in and for Richland county, in the then Territory of Dakota, now State of North Dakota, on the 10th day of May, 1882, at 10 o'clock in the forenoon, and was duly recorded in Book "D" of Deeds, on page 15, and said R. N. Ink, on the 7th day of April, 1883, by warranty deed, dated on said date, conveyed said land and premises to one J. S. Ink, which said deed was filed for record in the office of the register of deeds in and for Richland county, in the then Territory of Dakota, now State of North Dakota, on the 9th day of April, 1883, at 10 o'clock in the forenoon, and was duly recorded in Book "D" of Deeds, on page 291; that on the 6th day of January, 1885, said J. S. Ink, by warranty deed, dated on said day, conveyed said land and premises to the defendant herein, Albert Bladow, which said deed was filed in the office of the register of deeds in and for said county of Richland, in the then Territory of Dakota, now State of
6 North Dakota, on the 6th day of January, 1885, at three o'clock in the *fore*noon, and was duly recorded in Book "K" of Deeds, on page 55, and said defendant, Albert Bladow, under said deed, took possession of said land and premises and has ever since remained in possession as owner thereof in fee-simple.

XII.

That said defendant, Franklin Hall, has or claims to have some interest or lien upon the premises herein described, which said interest or lien is a mortgage in the sum of five hundred dollars ($500.00), made, executed, and deliver- by said defendant, Albert Bladow, to said defendant, Franklin Hall, on the 22nd day of November, 1893, and filed for record in the office of the register of deeds in and for Richland county, North Dakota, on the 4th day of December, 1893, at three o'clock in the *fore*noon, and duly recorded in Book 10 of Mortgages, on page 378, and said lien of said defendant, Franklin Hall, upon the premises herein described, acquired by him by, through, and under said mortgage was and is subject to the lien of the mortgage of the plaintiff herein, and said mortgage of the plaintiff herein is a first lien upon said premises herein described.

Wherefore plaintiff demands judgment against the defendants:

First. For the sum of five hundred and fifty-five and seventy-nine-hundredths ($555.79) dollars, and interest on the sum of four hundred eighty-six dollars ($486.00) thereof, at the rate of 12 per cent. per annum, from and since the 1st day of December, 1886, and interest on the sum of thirty-six dollars ($36.00) thereof, at the rate of 12 per cent. per annum, from and since the 1st day of December, 1885, and interest on the sum of thirty-three and seventy-nine one-hundredths dollars ($33.79) thereof, at the rate of 12 per cent. per annum, from and since the 14th day of August, 1890, and

the further sum of fifty dollars ($50.00) attorney's fees, as provided for in said mortgage, and the costs and disbursements of this action.

7 Second. That the usual decree be made for the foreclosure of said mortgage and the sale of the premises herein described, or so much thereof as may be necessary to pay the sum found due, with interest, costs, and attorney's fees, and costs of such sale, and the payment out of the proceeds of the amount of said judgment, so far as the proceeds will pay the same; that the plaintiff may have execution against the property of said defendants for any deficiency that may remain after applying all the proceeds of such sale of such premises properly applicable thereto and the satisfaction of said judgment.

Third. That said defendants, Albert Bladow and Franklin Hall, may be forever barred and foreclosed of all rights, claims, liens, and equity of redemption in and to the said premises and every part thereof, except only the right of said defendants to redeem the premises within one year after such sale.

Fourth. That all said defendants and each of them and all persons claiming or to claim by, through, or under said defendant, Charley Anderson, be forever barred and foreclosed of all rights, claims, liens, and equity of redemption in and to said premises and every part thereof, except only by right of said defendants to redeem the premises within one year after such sale, and the possession of said premises be delivered to such purchaser at such sale on the production of the sheriff's deed to the premises; that the plaintiff or any party to this action may become a purchaser at such sale.

Fifth. That the plaintiff may have such other and further or different relief in the premises as may be just.

Dated this 17th day of January, 1894.

FRED B. MORRILL,
Plaintiff's Attorney.

(Verified.)

8 The defendants Charley Anderson and Franklin Hall made no appearance in the action, but the defendant Albert Bladow appeared therein and filed the following—

Answer.

First. That he denies each and every allegation in said complaint contained not hereinafter admitted, qualified, or explained.

Second. That as to the matters alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 in said complaint, defendant has not knowledge or information sufficient to enable him to form a belief, and he therefore denies the same generally and specifically.

Third. Defendant expressly denies that the plaintiff has paid or caused to be paid the sum of $33.79 or any other sum for taxes upon the premises described in plaintiff's complaint for the years 1887, 1888, and 1889 or for any other years; and in that behalf the defendant alleges that during all of said years said land was not

subject to taxation, for the reason that the title to the same was in the Government of the United States.

Fourth. Defendant alleges that the land described in plaintiff's complaint as the north half of the northeast quarter of section twenty-four, in township one hundred thirty-one north, of range fifty, and the west half of the northwest quarter of section nineteen, in township one hundred thirty-one north, of range forty-nine west, are the same lands otherwise known and described in the United States Government survey thereof as the north half of the northeast quarter of section twenty-four, in township one hundred thirty-one north, of range 50 west, and lots one and two, in section nineteen, in township one hundred and thirty-one north, of range forty-nine west.

Fifth. Further answering, the defendant alleges that he is the absolute owner of the lands above described and the whole thereof, and has been such absolute owner from and since the 6th day of July, 1893, upon which day the Government of the United States, by its instrument in writing, known as a patent, dated on that
9 day, conveyed said premises to this defendant, which instrument in writing, known as a patent, was filed for record in the office of the register of deeds of Richland county, North Dakota, on the 25th day of October, 1893, at the hour of 2.15 o'clock p. m., and duly recorded in said office in Book "P" of Deeds, at page 234.

Sixth. Defendant alleges upon information and belief that during the year 1881 one Charley Anderson, named in plaintiff's complaint as the mortgagor therein mentioned, made an entry of said lands under the laws of the United States relative to and regulating the acquirement of lands of the United States by private individuals under the provisions of the law relative to pre-emptions, and that thereafter and on the 20th day of July, 1881, the said Charley Anderson made final proof upon said lands under the laws regulating pre-emptions, and made payment therefor to the receiver of the land office at Fargo, in the then Territory of Dakota, and on said day received from the receiver his duplicate receipt in writing acknowledging the payment to him of the purchase price of said lands by the said Charley Anderson, which receiver's receipt was filed for record in the office of the register of deeds of Richland county, in the then Territory of Dakota, on the 25th day of July, 1881, at 11 o'clock a. m., and was therein recorded in Book "D" of Deeds, at page 529.

Seventh. Defendant further alleges that the final proof aforesaid of Charley Anderson upon said lands was wholly false and fraudulent, and made by the said Charley Anderson with intent to defraud the Government of the United States out of said lands; that said Charley Anderson, at no time prior to the making of said final proof and the issuance to him of said receiver's receipt for payment of the purchase price of said lands, ever lived upon, occupied, or cultivated said lands or any portion thereof.

Eighth. That after the making of said final proof by said Anderson and the issuance to him of said receiver's receipt, as
10 aforesaid, and prior to the year 1889, by an order of the Secretary of the Interior of the United States, the entry of said

Charley Anderson for and upon said lands, together with the receiver's receipt aforesaid, issued therefor, were cancelled and declared wholly null and void, and said lands were, by an order of the said Secretary of the Interior, declared to be public lands of the United States, subject to entry under the homestead laws of the United States; that in the year 1888 this defendant made due lawful entry of said lands under the homestead laws of the United States, and that from said time up to the present time this defendant has been and now is in the open, notorious, and exclusive possession of said lands and the whole thereof.

Ninth. That this defendant is now the absolute owner in fee of said land and the whole thereof.

Wherefore this defendant prays judgment of this court (1) that the plaintiff take nothing by this action; (2) that this defendant have judgment against the plaintiff for his costs and disbursements herein; (3) that in this action this court determine by its proper decree that the plaintiff has no estate, right, title, interest in or claim upon said land or any part thereof; (4) that the title of this defendant to said lands and the whole thereof be declared, as against the plaintiff in this action, good and valid; (5) for such other and further relief as to the court may seem just in the premises.

Dated January 31st, 1894.

W. E. PURCELL,
Defendant Bladow's Attorney.

Verified.

Thereupon the issue made by the foregoing complaint and answer was submitted to the district court of Richland county on the following—

Agreed Statement of Facts.

1. That on the 6th day of January, 1881, the defendant
11 Charley Anderson filed in the United States land office at Fargo, in the then Territory of Dakota, his homestead application to enter the following described land, situated in Richland county, now State of North Dakota, and which land is the same land involved in this action, to wit: The north half of the northeast quarter of section twenty-four, in township one hundred thirty-one north, of range 50 west, and the west half of the northwest quarter of section nineteen, township one hundred thirty-one north, range forty-nine west, containing one hundred and forty-three and twenty-nine one-hundredths acres of land, according to the Government survey thereof; that said homestead application was passed upon by the register and receiver of said land office, by them accepted and placed of record, and receipt numbered 7471 issued to said Charley Anderson, he paying to the receiver the legal fees therefor, to wit, the sum of $14.00.

2. That after due notice by publication, pursuant to an order of the register of the above-named land office, the said Charley Anderson, on the 20th day of July, 1881, appeared before the register and

receiver of said land office, with his witnesses, and submitted and presented his final proof under section 2301 of the Revised Statutes of the United States, consisting of his testimony and the testimony of his witnesses in due form; that said proof and testimony was duly considered and passed upon by the register and receiver of said land office and by them accepted, allowed, and placed of record, and said Charley Anderson paid to the receiver of said land office for the Government of the United States the sum of $179.11, in full payment of the required fees and commissions of said land, and the register and receiver of said land office issued to said Charley Anderson their final certificate and receipt numbered 2971 therefor, there being no adverse claim to said tract; that said final receipt was filed for record in the office of the register of
12 deeds in and for the county of Richland, North Dakota, on the 25th day of July, 1881, at 11 o'clock a. m., and duly recorded in Book "D," at page 529.

3. That on the 20th day of July, 1881, and after said proof and payment, the said Charley Anderson duly mortgaged said lands to one H. E. Fletcher by instrument of mortgage executed on that date, being for the payment of the sum of $450.00; which mortgage was recorded in the office of the register of deeds of said county on the 25th day of July, 1881, at 11 o'clock a. m., in Book "E" of Mortgages, at page 433.

4. That on the 20th day of July, 1881, and after said proof and payment, said Charley Anderson duly mortgaged said lands to H. E. Fletcher by an instrument of mortgage dated on said date for the sum of $48.75; which mortgage was duly recorded in the office of the register of deeds on the 26th day of July, 1881, at 11 o'clock a. m., in Book "E" of Mortgages, at page 531.

5. That said first-mentioned mortgage was given by said Anderson to secure the payment of a certain promissory note executed and delivered by said Anderson to said H. E. Fletcher, whereby said Anderson promised to pay to the order of said Fletcher on the 1st day of December, 1886, the sum of $450.00, with interest thereon, at the rate of 12 % per annum, from and after maturity until paid; that attached to said first note and as a part thereof were five coupon notes for the sum of $36.00 each, representing the interest on said first note to the maturity thereof, each of said coupon notes bearing interest from and after maturity until paid at the rate of 12 per cent. per annum.

6. That thereafter and on the 20th day of June, 1882, the said H. E. Fletcher, for value received, assigned said first-mentioned mortgage to the plaintiff herein by an instrument in writing, dated on that day; which assignment was duly filed in the office of the register of deeds in and for said county on the 2nd day of October, 1884, at 7 o'clock a. m., and recorded in Book "M," at page 211; that said assignment was not under seal of the assignor, and
13 the signature of said H. E. Fletcher thereto was not witnessed, but said assignment was acknowledged before George A. Parker, a notary public of Hennepin county, Minnesota, by said H. E. Fletcher on the 20th day of June, 1882.

7. That thereafter and on the 20th day of November, 1883, in consideration of the full payment of said H. E. Fletcher thereof, the said H. E. Fletcher made, executed, and delivered to said Charley Anderson a satisfaction in due form of the mortgage mentioned second herein and of record in Book "E" of Mortgages, at page 431, which satisfaction was duly recorded in the office of the register of deeds on the 6th day of January, 1885, at 2 o'clock p. m., in Book "N," at page 273.

8. That said note for $450.00 and the coupon notes thereto attached, each for $36.00, and none of them has ever been paid, except that three of said coupon notes for $36.00 each were paid at maturity, and that the plaintiff is still the owner of said notes and mortgage, and that said mortgage has never been satisfied, but remains of record as aforesaid; that there is now due and owing the plaintiff on said notes and mortgage the sum of $522.00, with interest, at the rate of 12 per cent. per annum, on the sum of $486.00 from the 1st day of December, 1886, and interest, at the rate of 12 per cent. per annum, on the sum of $36.00 thereof from the 1st day of December, 1885.

9. That said mortgage was given by said Charley Anderson to the said H. E. Fletcher in the regular course of business and in good faith accepted by said H. E. Fletcher as security for the payment of the notes as aforesaid; that the assignment of said notes and the mortgage by the said H. E. Fletcher to the plaintiff was in the regular course of business, and plaintiff in good faith paid a valuable consideration for said notes and mortgage.

10. That on the 8th day of May, 1882, said Charley Anderson, by an instrument in writing known as a warranty deed, dated on that day, conveyed said land to one R. N. Ink, which deed was
14 recorded in the office of the register of deeds of said county on the 10th day of May, 1882, at 10 o'clock a. m., in Book "G" of Deeds, at page 15.

11. That on the 7th day of April, 1883, by an instrument in writing known as a warranty deed, the said R. N. Ink and Alta M. Ink, his wife, conveyed said premises to J. S. Ink, and that said deed was duly recorded in the office of the register of deeds of said county on the 9th day of April, 1883, at 10 o'clock a. m., in Book "G" of Deeds, at page 291.

12. That on the 6th day of January, 1885, by an instrument in writing known as a warranty deed, the said J. S. Ink and Della C. Ink, his wife, conveyed said premises to the defendant Albert Bladow, and that said deed was duly recorded in the office of the register of deeds of said county on the 6th day of January, 1885, at 3 o'clock p. m., in Book "K" of Deeds, at page 55, and the said Albert Bladow at once entered into possession of said premises under said deed, and has ever since remained and still is in possession thereof.

13. That on the 14th day of March, 1882, after the final proof of said Charley Anderson upon said lands had been made and passed upon by the register and receiver of said land office, and after the record thereof had been transmitted to the General Land Office, at Washington, D. C., the Commissioner of the General Land Office,

by letter "C" of March 14, 1882, held said entry of Charley Anderson upon said land, and directed the register and receiver of said land office to hold said entry for cancellation upon the ground that the testimony in said final proof of said Anderson for said tract of land was evasive and failed to show six months' residence.

14. That thereafter, to wit, on the 22nd day of January, 1886, the defendant Albert Bladow filed in the land office at Fargo, in the then Territory of Dakota, his application and affidavit to contest the entry of said Charley Anderson upon said lands on the grounds that the proof furnished by said Anderson upon said entry was
15 false in fact, and that said entry was fraudulent, and in said affidavit set forth that said Anderson had never established his residence upon said land, and had never resided thereon, and never made the same his home, as provided by the homestead laws of the United States.

15. That thereafter the Commissioner of the General Land Office, at Washington, D. C., upon such application and affidavit ordered and directed that a hearing be had before the register and receiver of the land office at Fargo between the defendant Albert Bladow and said Charley Anderson as to the truth of the allegations in said Bladow's affidavit and application for contest; that due notice of said hearing was given to said Charley Anderson by publishing the same in accordance with the order of the register of said Fargo land office, made upon an affidavit that personal service could not be made upon said Anderson; that at such hearing the said Albert Bladow appeared with his witnesses and gave evidence tending to establish as true the allegations of his said affidavit of contest, no appearance being made or testimony offered by said Anderson; that thereafter, and after the said hearing, and after the evidence taken thereupon had been transmitted to the Commissioner of the General Land Office, at Washington, D. C., and on the 14th day of November, 1887, said Commissioner ordered and directed that the entry of said Charley Anderson of and upon said lands be cancelled; and thereafter, in due and usual course of business, the register and receiver of the land office at Fargo duly cancelled said entry of record and notified the defendant Albert Bladow thereof.

16. That after the final decision of the said Commissioner of the General Land Office upon said contest and after the cancellation of the entry of said Anderson the defendant Albert Bladow duly made his homestead entry of and upon said lands, and thereafter, to wit, on April 26th, 1893, duly submitted his final proof therefor, which was passed upon by the register and receiver of the
16 land office and on said date placed of record and final receipt and certificate in due form issued to said Albert Bladow by the register and receiver of said land office at Fargo; and thereafter, on the 6th day of July, 1893, the Government of the United States issued upon said final receipt and certificate to said Albert Bladow a patent for said lands, conveying said premises to the defendant Albert Bladow, which patent was recorded in the office of the register of deeds of said county on the 25th day of October, 1893, in Book "P" of Deeds, at page 234.

17. That in the patent from the Government of the United States to the said Albert Bladow the premises herein involved were and are described as follows: Lots one and two of section nineteen, township one hundred and thirty-one north, of range forty-nine west, and north half of the northeast quarter of section twenty-four, township one hundred thirty-one north, of range 50 west; that said lands described are the same lands that are involved in this action and herein first described.

18. That the plaintiff has never been in the possession of said lands or any portion thereof.

19. That no notice of cancellation of said homestead entry and cash certificate of Charley Anderson was ever given to said H. E. Fletcher or the plaintiff herein, and such cancellation was made without actual notice of the decision of the Commissioner of the General Land Office to either said H. E. Fletcher or to the plaintiff, and neither said H. E. Fletcher nor the plaintiff herein was served with any notice of the contest of Albert Bladow involving said land, nor was the plaintiff or said H. E. Fletcher made any party defendant in said contest of Albert Bladow.

20. That the defendant Albert Bladow, in reliance upon his title and ownership of said lands as hereinbefore set forth, has since continued in possession thereof and made valuable improvements upon said premises by breaking and cultivating said lands and by erecting thereon buildings and permanent improvements of the value at least $800.00.

17 21. That the $14.00 fees and commissions paid by said Charley Anderson to the receiver of the Fargo land office on his homestead entry No. 7471 and the $179.11 fees and commissions paid by said Charley Anderson to the receiver of said land office on his cash entry No. 2791 has never been repaid and *is* still retained by the Government of the United States on his homestead and cash entries.

22. That upon the testimony submitted to the land department in the contest case of Albert Bladow against Charley Anderson, as heretofore set forth, the register and receiver of the Fargo land office and the Commissioner of the General Land Office found and decided as a conclusion of fact that the said Anderson had never resided upon said lands as required by law, and that his said entry was fraudulent, and said entry was therefore ordered and directed to be cancelled and was so cancelled upon such testimony as a fraudulent entry; that no appeal was ever taken by said Anderson from said decision.

23. That after the cancellation of the said entries of Charley Anderson, to wit, on June 15th, 1891, the plaintiff filed in the United States land office at Fargo proof of its interests as assignee of mortgagee in the lands herein involved, and moved that the patent be issued under the provisions of section 7 of the act of March 3rd, 1891, which motion was denied by the Commissioner of the General Land Office on the 13th day of August, 1891; that from said decision of the Commissioner of the General Land Office the plaintiff in this action, by its attorney, Fred B. Morrill, prosecuted

an appeal to the Secretary of the Interior, who, on the 15th day of July, 1892, rendered his decision thereon denying said motion.

24. That after the cancellation of the said entries of Charley Anderson and prior to the making of the final proof for said land by the defendant Albert Bladow, to wit, in the years 1887, 1888, and 1889, the proper authorities in that behalf levied and assessed or attempted to levy and assess taxes against said land in the total sum of $33.79, which the defendant failed and neglected to pay,
18 which amount the plaintiff herein paid to the treasurer of said Richland county on the 14th day of August, 1890, and received tax receipts therefor.

25. That the foregoing, together with the pleadings herein, certified copies of the patent from the Government of the United States to the defendant Albert Bladow mortgage of Charley Anderson to H. E. Fletcher as herein set forth, deed from J. S. Ink to defendant Albert Bladow, and such other records, certified copies of record, decision of the Commissioner of the General Land Office and Secretary of the Interior, and other testimony, as submitted herein, and the whole thereof, are hereby introduced and presented to the court as evidence and testimony in this case.

Dated this 30th day of March, A. D. 1895.

FRED B. MORRILL,
Attorney for Plaintiff.
W. E. PURCELL &
CHAS. E. WOLFE,
Attorneys for Defendant Albert Bladow.

Thereupon the said district court made and entered the following judgment:

On reading and filing the findings of fact and conclusions of law as made and found in the above-entitled action by the judge of this court, dated on the 17th day of April, 1895, and on the motion of W. E. Purcell and Charles E. Wolfe, attorneys for the defendant Albert Bladow, it is—

Ordered, adjudged, and decreed that the defendant Albert Bladow is the owner in fee-simple of that certain real estate situated in the State of North Dakota and county of Richland, described as follows:
Lots one and two, in section nineteen, in township one hundred thirty-one north, of range forty-nine west, and the north half
19 of the northeast quarter of section twenty-four, township one hundred thirty-one north, of range fifty west.

It is further ordered, adjudged, and decreed that the certain mortgage made and executed by the defendant Charley Anderson on the 20th day of July, 1881, whereby said lands were mortgaged to one H. E. Fletcher, to secure the payment of $450.00, which mortgage was recorded in the office of the register of deeds of Richland county, North Dakota, on the 25th day of July, 1881, at 11 o'clock a. m., in Book "E" of Mortgages, on page 433, which mortgage is now owned by the plaintiff in this action, is no lien upon and conveys no title to nor interest in the said premises nor any part thereof.

It is further ordered, adjudged, and decreed that said mortgage,

in so far as it is an apparent cloud upon the title of said defendant, Albert Bladow, to the said lands or any part thereof be, and it is hereby, cancelled.

It is further ordered, adjudged, and decreed that a copy of this decree may be recorded in the office of the register of deeds of said Richland county, and when so recorded the same shall be notice to all the world of the cancellation of said mortgage and the removal of the cloud arising therefrom from the title of the said Albert Bladow to said lands and the whole thereof.

It is further ordered, adjudged, and decreed that the defendant Albert Bladow have and recover of the plaintiff, The Guaranty Savings Bank, his costs and disbursements of this action, to be hereafter taxed and herein inserted by the clerk of this court.

Witness the Honorable W. S. Lauder, judge of the district court of the fourth judicial district of the said North Dakota, and my hand and the seal of this court, this 15th day of July, 1895, at Wahpeton, Richland county, North Dakota.

[SEAL.] C. A. McKEAN,
Clerk of the District Court, Richland County, N. D.

Thereupon the Guaranty savings bank perfected an appeal from said judgment to the supreme court of the State of North
20 Dakota, relying, on said appeal, on the following—

Assignments of Error.

1st. That the cancellation of Anderson's entry by the Commissioner of the General Land Office on the *ex parte* contest initiated by Bladow without notice to the mortgagee was contrary to law and void.

2nd. That Anderson's entry was confirmed and binding, and patent thereunder *and* should have been issued under section 7 of the act of March 3, 1891, entitled "An act for the repeal of the timber-culture law and for other purposes."

3rd. That the defendant Bladow, having purchased, subject to the mortgage, the title acquired by Anderson before the cancellation of Anderson's entry, is estopped from setting up any defense to the validity of the mortgage.

Thereupon the supreme court of the State of North Dakota rendered the following—

Opinion.

CORLISS, *J.:*

As originally instituted, this action had for its sole object the foreclosure of a mortgage, but on the trial it developed into a controversy over the legality of the cancellation by the Land Department of a homestead entry. The cause has been argued in this court on the theory that the plaintiff was in position to challenge the validity of such cancellation and to secure the benefits of the patent subsequently issued by the Government to a third person, based upon a new entry. The original entry was made by one

Anderson in January, 1881. In July, 1881, he executed a mortgage upon his interest in the land to secure the payment of $450. This mortgage was in June, 1882, assigned to plaintiff. It is to foreclose this mortgage that this action was commenced. Subsequently to the execution thereof the land was conveyed to the defendant Bladow. Thereafter such proceedings were had before the Land Department that on November 14, 1887, the Commissioner thereof ordered that the entry made by Anderson be cancelled. In these pro-
21 ceedings the commissioner found as a fact that Anderson had never resided upon the land, as required by law, but that his entry was fraudulent, and the entry was cancelled on that ground. Neither the original mortgagee nor the plaintiff was a party to these proceedings or had any notice of them. So far as they were concerned, such proceedings were *ex parte*. Notice of the hearing was, however, served on Anderson by publication in accordance with the rules and practice of the Land Department. It is undisputed that the mortgagee loaned his money and took his mortgage in good faith and for value, and that he had no actual knowledge of the fact that Anderson's entry was fraudulent. After the original entry was cancelled defendant Bladow made a homestead entry upon the same land and subsequently obtained a patent therefor, based upon such entry. The decree in this case sustains this patent and adjudges that the mortgage is therefore not a lien upon the land, but is a cloud thereon, and should accordingly be cancelled. From this decree the plaintiff appeals.

In deciding this case we will adopt a theory more favorable to the plaintiff than the record will justify. We will assume that it has foreclosed its mortgage and has secured the rights of the mortgagor in the land. The only feature which distinguishes this case from Parsons *vs.* Venzke, 4 N. D. Rep., 452; 61 N. W. Rep., 1036, is the fact that the holder of the mortgage was not a party to the proceedings in the Land Department which culminated in the cancellation of Anderson's entry. This fact, does not, however, render the cancellation a nullity as to the mortgagee. The Land Department has, until a patent has been issued, complete control of the question whether it will cancel an entry. Its power is not dependent on jurisdiction over the person of any one, as the authority of a court is. By the issue of a certificate it does not lose control over the land. Such certificate is in effect no more than a statement that *prima facie* the person to whom it is issued appears to be en-
22 titled to a patent. Whether subsequent investigation will lead to a different conclusion is left unsettled, and whoever deals with the holder of such certificate is chargeable with knowledge that the proceedings instituted to secure the legal title to the land from the Government are *in fieri*, and that the Land Department may at any time revoke the certificate, thus destroying the entryman's *prima facie* right to the patent. What procedure it will adopt, what persons it will notify, or whether it will proceed on notice at all or not are matters within the discretion of the department, so far as the mere matter of power is concerned, Congress not having prescribed any practice in such cases. No matter how arbi-

trary the Land Department may act, its cancellation is not a mere nullity; but such arbitrary action will, however, entitle the entryman to a hearing in court, and on this hearing he will be allowed to show that, as a matter of fact, his entry was not fraudulent; but no such showing was made in this case. Indeed, it is not claimed that the entry was not in fact fraudulent. The Land Department has in such case, it is true, in the exercise of its undoubted power, destroyed his *prima facie* evidence of right to a patent, but because it has acted in an arbitrary manner, has denied him a hearing, the law will permit the entryman to prove in court the facts showing his entry to be valid, because the law regards the rights of an entryman who has in good faith complied with the statute as property rights, and will give him an opportunity to defend such rights, either in the Land Department or, if he is there denied a chance to protect himself, in the proper judicial tribunals. The only effect of the doctrine that an *ex parte* cancellation of an entry is not a mere nullity is to place the burden of proof upon the entryman or those who claim under him; but it cannot be disputed that the Land Department might, despite the fact that he holds a certificate, require the entryman to furnish additional proof of his good faith and his compliance with the requirements of law on proceedings in the Land Department instituted for the purpose of cancelling
23 his entry. The Land Department may, notwithstanding the fact that it has issued a final certificate, compel the entryman or any one claiming under him to assume the burden of proof on penalty of having the entry cancelled if additional proof is not produced. The utmost scope of the effect of the doctrine than an *ex parte* cancellation is valid is to cast upon the entryman in the court the very burden of proof which may be imposed upon him by the department itself. The contention against the soundness of this doctrine must be that he has a vested right to use the certificate as *prima facie* evidence of his right to a patent. There is nothing in the acts of Congress to warrant such a view; and to assert that it is sound on general principles is to assume the very point in controversy. The utmost which it can be said that the Government has done in issuing the certificate to him is to give him an instrument which will *prima facie* show that he is entitled to a patent so long as this instrument remains unannulled, but the same power which issued it is vested by Congress with full control over it, and may revoke it at any time, and the destruction of it carries along with it the necessary consequence that it can no longer be presented in evidence to any tribunal as the declaration of the Government that the person named in it has complied with the law and is entitled to a patent; but after a person has been accepted by the Government as an entryman it cannot escape the issuance of a patent to him if his entry was in fact legal, and this fact he may prove in the proper judicial tribunal if he is denied a hearing in the Land Department. In this way his property rights are fully protected. As he is compelled to pursue the legal title in the hands of one who has succeeded to the rights of the Government, he is of necessity obliged to make out against such person a legal right to demand the patent from the

Government. This he must do by evidence showing that his entry was in fact legal. He cannot use the cancelled certificate for that purpose, for to insist upon his right to use it is to assume
24 the legality of the entry—the very question to be established. He could not, as a matter of fact, use it as *prima facie* evidence in the Land Department before cancellation on the trial of the issue whether his entry was legal. How, then, can he claim that he has such a right to use it as evidence in a court after cancellation as constitutes a vested property right? It is obvious that if the mere fact that the cancellation of an entry was *ex parte* gives the entryman an absolute right to secure the patent from a third person to whom it has been issued, then it is of positive benefit to a fraudulent entryman to be denied a hearing in the Land Department. The denial of a hearing, although upon such hearing he should be defeated, places him in an impregnable position in his contest for the title. The very most which can possibly be claimed is that the original entryman should not be required to make out a *prima facie* case by evidence, but it should be permitted to rely upon the cancelled certificate as creating a presumption in his favor. This position, we have seen, is not tenable. The reasoning of this court in the case of Parsons *vs.* Venzke leads logically to the conclusion we have reached. The case of Mortgage Co. *vs.* Hopper, 56 Fed., 74, affirmed 12 C. C. A., 293; 64 Fed., 553, is directly in point. See also U. S. *vs.* Steenerson, 1 C. C. A., 552; 50 Fed., 507.

We are not unmindful of that fact that, in view of delays in the issuance of patents and the rule of law that until a patent has been issued the courts have no jurisdiction to redress the wrong done the original entryman or his grantee or mortgagee by an *ex parte* cancellation, injustice may result from the doctrine that the Land Department may thus impose upon such persons the burden of proving the original entry to have been legal. The earliest period at which they adduce proof to sustain the entry may be so remote from the time when such entry was made that no evidence can be obtained by them to support what was in fact a perfectly valid entry, but cases presenting these extreme features will not fre-
25 quently arise, and those who find themselves in this predicament are always somewhat in fault in not discovering the fact of the cancellation and making an effort to be heard in the Land Department to have the original entry reinstated. Moreover, in such cases the courts would incline to consider slight evidence as sufficient *prima facie* proof that the original entry was in fact valid, and compel the holder of the patent to sustain by evidence the finding by the department that it was illegal. No hardship could result to the holder of the patent from such a rule; for the fact that the cancellation of the original entry was *ex parte* will appear from the records of the Land Office, and he is therefore chargeable with knowledge that the question of fact whether such entry was legal is still open to investigation in the courts, and that from the very nature of the case the original entryman, or those claiming under him, should not be held after the lapse of a considerable period of time to a high decree of proof to establish a *prima facie* right.

It is urged that inasmuch as defendant Bladow, who made the second entry and subsequently secured the patent, was also the person who succeeded to Anderson's interest in the land, he is estopped from claiming that the mortgage is not a lien on the land; but Bladow did not assume the mortgage nor did the deed to him even state that he took the land subject to the mortgage. There is no element of estoppel in the case. Bladow is not questioning the legal sufficiency of the mortgage as a contract, nor does he assert that it is not a lien on whatever interest Anderson had in the land. He is merely claiming title from a different source. When he purchased the land from Anderson's grantees he entered into no implied agreement that in case Anderson's entry was fraudulent and was finally overthrown he would not purchase the land from the Government without taking care of the mortgage debt. He did not borrow the money or assume the mortgage, nor are we able to discover from this record that he is even under any moral obli-
26 gation to see that it is paid. The amount of such mortgage does not appear to have been deducted from the purchase price when he bought from Anderson's grantee; and if this were the fact he would be under no legal or moral obligation to pay it under the facts of this case, for it appears that every dollar he paid for Anderson's title was money thrown away. The deed he obtained gave him no title, nor did it place him in a position to contest the legality of Anderson's entry different from that which he occupied before it was delivered to him. It was of no advantage to him whatever.

The judgment of the district court is affirmed. All concur.

(69 N. W. Rep., 41.)

Thereupon, on the 10th day of November, 1896, the supreme court of the State of North Dakota transmitted to the district court of Richland county the following—

Remittitur.

File No. 399.

STATE OF NORTH DAKOTA, *In Supreme Court,* } *ss:*

GUARANTY SAVINGS BANK, Plaintiff and Appellant,
vs.
ALBERT BLADOW, Defendant and Respondent.

Appeal from the district court of Richland county.

This action coming on to be heard at the April, A. D. 1896, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota—present, Alfred Wallin, chief justice; Guy C. H. Corliss and J. M. Bartholomew, associate justices—and the appeal having been argued by Fred B. Morrill, for the appellant,

and by W. E. Purcell, for the respondent, and the court having
27 advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court within and for Richland county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated November 10th, 1896.

By the court:

ALFRED WALLIN,
Chief Justice.

Attest: R. D. HOSKINS, *Clerk.*

[Seal of the Supreme Court of North Dakota.]

Thereupon, on the 12th day of May, 1898, the district court of Richland county entered the following—

Judgment.

The above-entitled action having been duly heard and determined by the district court and a judgment entered in favor of the defendant Albert Bladow and against The Guaranty Savings Bank, plaintiff, for the costs and disbursements of said action and other relief on the 15th day of July, 1895, which judgment appears of record in this court, and the plaintiff having taken an appeal to the supreme court of the State of North Dakota from said judgment, and the supreme court having, on said appeal, affirmed said judgment and ordered the entry of judgment for the costs of said appeal against the plaintiff, Guaranty Savings Bank, and in favor of said Albert Bladow, as appears by the remittitur of the supreme court filed herein:

28 Now, therefore, on motion of Messrs. W. E. Purcell and Charles E. Wolfe and in order to conform with the proceedings heretofore had in said case, it — hereby adjudged and decreed that the judgment heretofore entered in said cause on the 15th day of July, 1895, in favor of said Albert Bladow and against the Guaranty Savings Bank be, and the same is hereby, in all things affirmed; and it is further adjudged and decreed that said Albert Bladow, defendant, have and recover of the Guaranty Savings Bank the sum of $36.00, costs and disbursements on the appeal in said case as heretofore taxed and allowed.

Witness the Honorable W. S. Lauder, judge of the fourth judicial district of the State of North Dakota, and the seal of said court, at Wahpeton, Richland county, this 12th day of May, 1898.

[SEAL.] C. A. McKEAN,
Clerk of the District Court, Richland County, N. Dak.

Thereupon the plaintiff in error herein applied to the Supreme Court of the United States for a writ of error to review the decision of the supreme court of the State of North Dakota in said action; which writ of error was granted, and the plaintiff in error filed the following—

Assignments of Error.

Comes now The Guaranty Savings Bank, plaintiff in error, by S. B. Pinney, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. That the supreme court of the State of North Dakota erred in holding and deciding that the cancellation of Charley Anderson's entry by the Commissioner of the General Land Office on the *ex parte* contest initiated by Albert Bladow without notice to the Guaranty Savings Bank or its assignor, H. E. Fletcher, was valid as to the plaintiff in error, and that said Commissioner had under the laws of Congress power to cancel said entry and *and* allow Bladow's application to enter without notice to the holder of
29 the mortgage.

Second. That the action of the Commissioner of the General Land Office in cancelling Anderson's entry and allowing Bladow's entry without notice to the owner of the mortgage was a nullity as to said mortgage, and the said mortgage in question having been given and received in good faith for a valuable consideration prior to March 1st, 1888, and after the final entry of Charley Anderson under the provisions of section 7 of the act of Congress approved March 3rd, 1891, entitled "An act for the repeal of the timber-culture law and for other purposes," the plaintiff in error was entitled to a confirmation and patent of the entry of Charley Anderson, and the supreme court of North Dakota erred in declining to so hold and decide.

And whereas by the law of the land the said judgment ought to have been for the said plaintiff in error, Guaranty Savings Bank, and against said defendants in error, Charley Anderson, Albert Bladow, and Franklin Hall, *and* the said Guaranty Savings Bank, plaintiff in error, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which *he* hath lost by occasion of the said judgment.

S. B. PINNEY,
Attorney for Plaintiff in Error.

[Endorsed:] Case No. 16,984. Supreme Court U. S., October term, 1898. Term No., 399. Guaranty Savings Bank, pl'ff in error, *vs.* Albert Bladow. Agreed record. Filed October 25, 1898.

FILED
JAN 28 1899
Clerk.

No. 134

IN SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1898.

ARANTY SAVINGS BANK,

Plaintiff in Error,

vs.

ALBERT BLADOW,

Defendant in Error.

rief for Plaintiff in Error.

S. B. PINNEY,
Attorney for Plaintiff in Error.

B. MORRILL and
EDWARD ENGERUD,
of Counsel for Plaintiff in Error.

(16984)

IN SUPREME COURT

OF THE UNITED STATES.

No. 399.

OCTOBER TERM, 1898.

GUARANTY SAVINGS BANK,

Plaintiff in Error,

vs.

ALBERT BLADOW,

Defendant in Error.

PLAINTIFF IN ERROR'S BRIEF.

This action was brought in the District Court of Richland County, North Dakota, to foreclose a mortgage on the North half of the Northeast quarter of section 24, Township 131 N., Range 50 W., and West half of the Northwest section 19, Township 131 N., Range 49

4 W., given by one Charley Anderson to one H. E. Fletcher and thereafter assigned to plaintiff in error. Bladow, defendent in error, alone answered. The case was submitted upon an agreed statement of facts which are in substance as follows: Anderson made proof and payment under the commutation clause of
5 the homestead law in due form and to the satisfaction of the register and receiver of the local land office, paid the required fees and commissions and the usual final certificate was issued to him. (Ast. pp. 7 and 8, fol. 11.) Thereafter, Anderson for the purpose of securing the sum of $450.00, made, executed and
6 delivered to H. E. Fletcher a mortgage covering the land involved, which mortgage was duly recorded in the office of the register of deeds of the proper county. This mortgage was on June 20, 1882, duly assigned to plaintiff in error and said assignment duly recorded. (Abst. p. 8, fol. 12.) The mortgage and assign
7 ment were each given and received in good faith in the regular course of business and for a valuable consideration. (Abst. p. 9, fol. 13.) On January 6, 1885, Bladow acquired by purchase the title held by Anderson. (Abst. p. 9, fol. 14.,) and after acquiring such title, to-wit,

on January 22, 1886, contested in the land department Anderson's patent certificate, (Abst. p. 10. fol. 14.) which was cancelled by the commissioner of the general land office under and by virtue of such contest. (Abst. p. 11 fol 17.) That in said contest neither the said H. E. Fletcher nor plaintiff in error were made parties, served with notice, or notified in any manner, and neither appeared in said contest before the land department. (Abst. p. 11, fol. 16.) On June 15, 1891, after the cancellation of Anderson's entry, and before patent was issued to Bladow, plaintiff in error filed in the land department proof of its interest as assignee of the mortgage and moved that patent be issued upon the final certificate of Anderson under the provisions of Section 7 of the Act March 3, 1891, (26 U. S. St. 1095.,) which motion was denied by the commissioner of the general land office, and upon appeal said decision was affirmed by the secretary of the interior. (Abst. pp. 11 and 12, fol. 17.) The fees and commissions paid by Anderson to the Government have never been repaid. (Abst. p. 11, fol 17.) Upon the facts presented the District Court decided in favor of defendant in error, confirming his title under the

patent issued to him by the Government of the United States and denying the foreclosure, setting aside and cancelling plaintiff in error's mortgage. (Abst pp. 12 and 13, fol. 19.) And upon appeal to the State Supreme Court the decision of the court below was sustained. (Abst. pp. 13, 14, 15, 16 and 17.)

SPECIFICATIONS OF ERROR.

First:—That plaintiff in error by virtue of Anderson's mortgage acquired an interest in the land of which it could not be deprived without being made a party of the proceedings in the Land Department, served with notice and given an opportunity to be heard.

Second:—That the cancellation of Anderson's entry by the Commissioner of the General Land Office on the ex-parte contest initiated by Bladow without notice to plaintiff in error was contrary to law and void.

Third:—The proceedings in the land Department leading up to the cancellation of Anderson's entry being irregular and void were of no effect, and said entry was therefore confirmed and patent thereunder should have been issued under section 7 of the Act of March 3, 1891, entitled "An act for the repeal of the Timber Culture Law and for other pur-

poses" upon the application of plaintiff in 16
error.

ARGUMENT.

In this case the entry made by Anderson was cancelled by the commissioner, on the contest initiated by Bladow, *in which case the mortgagee was not made a party defendant, or served with any notice whatever.* 17

While we do not deny the power of the commissioner, under certain conditions; to cancel an entry of public lands before patent, yet we do contend that such power is not arbitrary, unlimited or discretionary, but must be exercised in accordance with law.

Bogan v. Edinburg American Land 18
Mtg. Co. 63 Fed., 192.

Cornelius v. Kessell, 128 U. S., 446.

Lindsay v. Hawes, 2 Black, 554.

Stimson v. Clark, 45 Fed., 760.

Parsons v. Venzke, 164 U. S. 90. (L. Ed. 41, 360.)

Orchard v. Alexander, 157 U. S. 372. 19
(L. Ed. 39, 737.)

In case of Bogan v. Mortgage Co., Supra., Judge Sanborn, in rendering the decision for the court, says: "The supervisory or reviewing power of the commissioner of the

land office, or of the secretary of the interior, is not an arbitrary, unlimited or discretionary power, but a power that must be exercised according to law, or not in violation or in disregard of it."

In case of Parsons v. Venzke, Supra., the court in speaking of the jurisdiction of the land department says that such jurisdiction is "a jurisdiction not arbitrary or unlimited, *nor to be exercised without notice to the parties interested.*" In the case at bar Anderson was in no way interested in the contest prosecuted by Bladow. He at that time had no interest in the land, or in the result of the contest, and yet he was the only party proceeded against or served with notice. Plaintiff in error, who was the only party interested, was not notified in any manner or even made a party to the contest proceedings. Proof and payment had been made by Anderson, which proof and payment had been accepted by the Register and receiver as the agents of the government and final certificate and receipt issued to him. By such purchase the land embraced in the certificate became subject to all the incidents of private ownership, including taxation, and Anderson could legally mortgage or transfer it

before the issuance of a patent from the 24
government.

Carroll v. Safford, 3 How., 450.

Witherspoon v. Duncan, 4 Wall., 210.

United States v. Budd, 144 U. S., 154.

This being so, it necessarily follows that the mortgagee acquired a property interest therein, and while it is true the mortgagee ac- 25
quired no greater right than the entryman, it is also true that the right acquired was no less. The cancellation of Anderson's entry, destroyed the right of the mortgagee as well as the right of Anderson. And we here apply the rule laid down by the court in Bogan v. Mortgage Co., as above quoted, and say that 26
while it was within the province of the commissioner of the general land office to cancel Anderson's entry if that entry was fradulent, yet we say that it was not within the power of the commissioner to arbitrarily cancel that entry and deprive the mortgagee of a vested right without notice, or an opportunity to be 27
heard, or even being made a party to the proceedings under which that entry was cancelled.

The power of the commissioner must be exercised according to law and not in violation of it, and we do not believe that any one will

maintain that the depriving of a person of a vested right to the extent of $450 without notice and without even being made a party to the proceedings is according to law. In fact it is in direct violation of all principles of law and Article 5, of the Constitutional Amendment, which provides that no person shall "*be deprived of life, liberty or property without due process of law.*"

Due process of law, is law in the regular course of administration through courts of justice after *due notice and an opportunity to appear and be heard.*

2 Kent Com. 13.

Westervelt v. Greggs 12 N. Y. 202.

Bank of Columbia v. Okely, 4 Wheat, 235

Hurtado v, California, 110 U. S. 516.

Leeper v. Texas 139 U. S. 457.

In this country property rights of an individual cannot be lawfully divested *without granting him a hearing.*

Windsor v. McVeigh 93 U. S., 274.

Lewis v. Shaw, et. al., 57 Fed. 516.

Hollingsworth v. Barbour, 4 Pet., 466.

Woodruff v. Taylor, 20 Vt. 65.

In the latter case in speaking upon this point

the court says: "A proceeding professing to de- 32
termine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

This language is quoted with approval by 33
Justice Field in Windsor v. McVeigh, Supra.

While we grant the power of the Commissioner of the general land office to cancel an entry before patent, yet we do not concede that the commissioner of the land department has any greater power than a duly established court of justice would have, and no one would 34
contend that a decree of the highest court in the land could adjudicate the right of an individual without making him a party to the proceedings and serving him with notice.

It is certain that after purchase Anderson had the legal right to mortgage the land, and the mortgagee had the legal right to accept the 35
mortgage. This being so it must follow as a matter of course that the mortgagee had a property right in the land to the extent of the mortgage. And if the land department had the power to pass upon and adjudicate that

property right, that power must in a certain sense be a judicial power, and the process of adjudication a judicial process.

The rights of the mortgagee were a matter of record, and Bladow, the complaining party in those proceedings, had notice not only from those records but from his deed in which the mortgage is described.

The proceedings were ex-parte, substituted service being made upon Anderson, who had no interest in the land at that time, and the cancellation of Anderson's entry by Bladow's contest was an easy way of removing the encumbrance of the mortgage then against Bladow's title. There appears a good reason why Bladow did not make plaintiff in error a party to the contest and serve it with a notice of the proceedings. By so doing *Bladow's true position* would have appeared before the land department, and plaintiff in error might have been able to submit testimony refuting the charge made against Anderson's entry. As it was, the contest was in effect Bladow v. Bladow.

The question is, did the land department have jurisdiction? Did the department acquire jurisdiction in an action making Anderson the only defendant, when Andersen was not a party

in interest and had no rights to be adjudicated in an action surreptitiously brought by Bladow to set aside his own title for the express and only purpose of defeating the mortgage? Could the commissioner of the general land office hear, try and determine the rights of plaintiff in error in an action in which it was not even made a party, and yet was the only real party in interest and the only party that would suffer by a decision adverse to the entry? We believe that the decisions cited and that part of article five of the Constitutional Amendment which provides that no person shall "be deprived of life, liberty or property without due process of law" is sufficient answer.

If our position upon this point is correct then the cancellation of Anderson's entry was void, and the entry remains as though it had never been cancelled, and patent for the land should have been issued upon the application of the plaintiff in error for patent under section 7 of the Act of March 3d, 1891, entitled "An Act for the Repeal of the Timber Culture Law, and for Other Purposes." (26 St. 1095) That portion of Section 7 of said Act which relates to this case provides as follows: "And all entries made under pre-emption, homestead,

desert land, or timber culture laws, in which final proof and payment *may have been made and certificate issued; and to which there are no adverse claims originating prior to final entry, and which have been sold or encumbered prior to the first day of March, eighteen hundred and eighty eight, and after final entry, to bona fide purchasers, or encumbrancers for a valuable consideration*, shall, unless upon investigation by a government agent, fraud on the part of the purchaser has been found, *be confirmed and patented* upon presentation of satisfactory proof to the land department of such sale or encumbrance."

That provision is wholly remedial and under the familiar rules of construction, the broadest possible scope toward effecting the object for which it was enacted, that its language will imply must be given to it. Remedial statutes are to be liberally construed to suppress the evil and advance the remedy.

Suth. Stat. Cons., Section 207.

Hulder v. Golden, 36 N. Y., 446.

Cullerton v. Mead, 22 Cal., 96.

Oates v. First National Bank, 100 U. S. 239.

Smith v. Stevens, 82 Ill., 554.

C. B. & Q. R. R. Co., vs. Dunn, 52 Ill, 48
260.

Rockford, Rock Island and St. Louis R. R.
Co. v. Heflin, 65 Ill., 366.

Hudley v. Morrison, 39 Ill., 392.

And generally it may be affirmed that if a statute may be liberally construed, everything is to be done in advancement of the 49
remedy, or the purpose intended, that can be done consistently with any construction that can be put upon it. The substance of the act is principally regarded and the letter is not too closely adhered to.

Suth. Stat. Const. Sec. 410.

We presume no one will question the 50
proposition that the design of this law is to afford protection to good faith purchasers or incumbrancers after final entry and before patent of lands acquired under the public land laws named; and it is clearly apparent that it is intended to *cover past transactions.*

The conditions that must exist in order to 51
bring an entry within the curative operation of the law, exist in this case. All that is necessary is an entry under the pre-emption, homestead, desert lands or timber culture laws, in which final proof and payment may have

been made and certificate issued; there must be no adverse claim originating prior to final entry; the land embraced in the entry must have been sold or incumbered for a valuable consideration, to a party holding under the incumbrance, or lien, in good faith, subsequent to date of final entry and prior to March 1, 1888.

All these conditions exist as to the mortgage and Anderson's entry.

The language of the law shows that it was the intention of congress to confirm every entry of public lands of the class described in the second clause of said section, and we base our contention in this regard on the language of the clause, the words of which are as follows: "*And all entries . . . in which final proof may have been made and certificate issued*" *shall be confirmed and patented.* The gist and intent of this clause is to protect the good faith purchaser or incumbrancer of lands after entry and before patent, and as a condition to receiving the benefits of the law, his good faith must be established and no fraud found in him.

The good faith of the incumbrancer in this case is admitted, the agreed statement of facts show that the mortgage was accepted by the

mortgagee in good faith in the regular course 56
of business, and our contention is simply this, that the cancellation of Anderson's entry was illegal and void and of no effect, and that the Act of March 3, 1891, having been passed prior to the final proof of Bladow, this entry comes within the curative provisions of that Act and should have been patented under the 57
application of plaintiff in error for patent, and the decision of the secretary of the interior upon the application for patent under said Act. should have been in favor of the application and issuing of patent to Anderson.

The decision of the secretary of the interior upon that question not being upon a question 58
of fact, but upon a question of law, is not binding upon the court and can be reviewed in these proceedings.

While the general provision is recognized that where the land department or any other special tribunals is authorized to hear and determine certain matters, its decisions within 59
the scope of its authority are conclusive, yet where such tribunals have mistaken the law or committed errors, courts of justice have always had the power to inquire into and correct mistakes, injustice and errors. This point has been passed upon by the Supreme Court of

the United States in many well adjudicated cases, the most notable of which are;

Johnson v. Tousley, 13 Wall., 72.

Stark v. Starrs, 6 Wall., 402.

Lindsey v. Hawes, 2 Black, 554.

Cornelius v. Kessell, 128 U. S., 456.

Widdicombe v. Childers, 124 U. S., 530.

Bernier v. Bernier, 147 U. S., 242.

In the case of Perry v. O'Hanlan, 11 Mo., 373, it was held that where the commissioner of the general land office had acted without authority in cancelling an entry, the cancellation would be held for naught in a court of law.

In the case of Risdon v. Davenport, 57, N. W. 482, a case recently decided by the supreme court of South Dakota. The Court says, "The answer alleges that no personal service was made, and no affidavit made or filed justifying service by publication, and that Conway in no manner appeared in such proceedings. The result of these pleaded facts is that both the local land office and the commissioner of the general land office—it does not appear how the case got before the commissioner—undertook to investigate and adjudicate upon the right of Conway to this land, for which he held a receiver's receipt, without jurisdiction. This they could not do; and upon such facts their decision, like that of a court without jurisdiction, would

be void, and would be so held in a collateral 64
proceeding. This proposition without respect to courts, is so thoroughly established as to require no supporting citations. See American & English Enc. Law, p. 311. If courts clothed with full judical powers can legally act only upon such persons and matters as have by proper process been brought under their jurisdiction, 65
it cannot be that a quasi judicial officer can summarily dispose of vested rights without notice to the holder and opportunity to be heard. Appellant argues that these officers, on account of the nature of their powers and duties, and the general control which they have over the matters of law committed to them, should be regarded as courts of general jurisdiction, and, 66
consequently, that every reasonable presumption should be indulged in to sustain their jurisdiction; but, even if this were so, there is no room for presumption here. In such cases it is presumed, in the absence of evidence, that the facts existed which were necessary to confer jurisdiction; but such presumption cannot pre- 67
vail against the established fact that they did not exist."

So in this case the fact exists that the land department attempted to adjudicate the rights of plaintiff in error without it being even a party to the proceedings or given an oppor-

68 tunity to be heard. Again the Court says that in cancelling Conway's entry, the land department could only do so when acting judicially, and it could not act judicially in a matter over which it had no jurisdiction. We call special attention to this case and the authorities cited as being directly in point with the case at bar.

69 The State Supreme Court recognizes the distinction between the case of Parsons v. Venzke, Supra, and the case at bar, but fail to apply the true rule. Judge Corliss in rendering the opinion for the court says that the only feature which distinguishes this case from Parsons v. Venzke, is the fact that the holder of the mortgage was not made a party to the pro-
70 ceedings in the land department which resulted in the cancellation of Anderson's entry. (Abst. p. 14, fol. 21.) The court bases its decision upon the presumption that until patent issues the land department had complete control over the land, and that its power is not dependent upon jurisdiction over the person of any one;
71 and no matter how arbitrarily it may act, its cancellation is not a mere nullity. We contend that the land department had no power to arbitrarily cancel a final certificate when once issued. True it can suspend the issuance of a patent and call for additional evidence, or it may take steps looking toward the cancella-

tion or setting aside of the certificate, but it 72
cannot without notice and of its own motion, cancel such certificate, thereby depriving the entryman and all parties in interest of an opportunity to be heard. The proof upon which the certificate is based may be defective and not warrant the issuance of a patent thereon, but in such case the entryman must be given an opportu- 73
nity to remedy the defect before the certificate can be finally cancelled and set aside, and if the original entryman had parted with his interest, the one then interested can appear and defend his rights and furnish any evidence necessary to cure the defect and must be notified for that purpose and made a party of the proceedings. 74

Under the rule laid down by the court, in its opinion, any person can file ex-parte affidavits, or present testimony to the land department, against any entry before patent issues and upon such showing the department can cancel the entry without notice to the entryman, or anyone else. Surely such a practice cannot 75
be sanctioned and is not in accordance with the decisions of this and other courts as herein cited. The land department can suspend the issuing of a patent, and it can cancel a final or patent certificate, but it cannot act without notice, not only to the entryman, but to all

parties interested. Another point in this case is the fact that the certificate was cancelled by the department, not upon proceedings instituted by the department, but upon a contest initiated and prosecuted by Bladow, who had knowledge of the interest of the plaintiff in error and concealed that interest. We submit that the cancellation of Anderson's entry was a nullity, and that the entry was confirmed under section 7 of the act of March 3, 1891, and the land department erred in not issuing a patent to Anderson upon the application of plaintiff in error.

Respectfully submitted,

S. B. PINNEY,

Attorney for Plaintiff in Error,

F. B. MORRILL and

EDWARD ENGERUD,

of Counsel for Plaintiff in Error.

(16984)

IN SUPREME COURT

OF THE UNITED STATES.

No. 399.

GUARANTY SAVINGS BANK,

Plaintiff in Error,

vs.

ALBERT BLADOW,

Defendant in Error,

BRIEF OF DEFENDANT IN ERROR.

This action originated in the District Court of the Fourth Judicial District, of the State of North Dakota, wherein it was tried upon the stipulated facts set forth in the abstract and judgment rendered for defendant in error; from that judgment an appeal was taken by plaintiff in error to the Supreme Court of the State of

North Dakota, in which Court the judgment of the District Court was affirmed. The object of this appeal is to review alleged errors of the Supreme Court of the State of North Dakota.

The summary of facts in the brief of the plaintiff in error is correct, so far as it goes, but it fails to call the attention of the Court to fact No. 22, page 11 of the abstract, as stipulated. The special attention of the Court is, therefore, called to these facts: Notice of the hearing of the contest of Anderson's entry was duly served upon the entryman, in accordance with the rules of the Department of the Interior; testimony was taken upon such hearing pursuant to such notice, and from such testimony, the Commissioner of the General Land Office found and decided as a conclusion of fact, that the said Anderson had never resided upon the lands covered by said entry, as required by law, and that his said entry was fraudulent in fact. No appeal was ever taken by said Anderson, or by the plaintiff in error from such decision.

It may simplify matters somewhat, if, in the consideration of this case, it be borne in mind that by reason of the foregoing facts, the entry of Anderson upon the land involved, was fraudulent in fact; because it needs no authority to sustain the averment that a decision rendered by

the Commissioner of the General Land Office, upon a question of fact, he having jurisdiction of the parties and the subject matter in accordance with the rules of the Interior Department, is final and binding upon all other tribunals. 8

Therefore, as between Anderson, the entryman and his privies and the defendant in error, Bladow, the fact is established beyond question in this case, that Anderson's entry of the lands was fraudulent, and his rights, and those of his successors in interest, must be determined with reference to that fact. 9

Anderson's entry is dated June 6th, 1881, the mortgage of plaintiff in error being dated July 20th, 1881. On the 8th day of May, 1882, Anderson conveyed the land by warranty deed to one R. N. Ink, who, on the 7th day of April, 1883, by a like instrument, conveyed the premises to J. S. Ink, who, on the 6th day of January, 1885, by warranty deed, conveyed the premises to the defendant in error, Albert Bladow; all of these deeds being properly recorded. 10 11

Another fact of importance to be remembered is, that on the *14th day of March, 1882* the Commissioner of the General Land Office held Anderson's entry of this land for cancellation for evasiveness and insufficiency (Finding 13, page 9, Abstract). This was three yerrs before

Bladow obtained any interest, either in the land or the paper title thereto. Nearly four years after this holding by the Commissioner of the General Land Office, from which no appeal was taken, to-wit, on January 25th, 1886, Bladow commenced his contest of Anderson's entry. At the time of the commencement of this contest, that entry had been suspended, and held for cancellation, for a period of four years.

After the hearing of the said contest, to-wit, on the *14th day of November, 1887*, the Commissioner of the General Land Office finally canceled Anderson's entry, because the same was fraudulent.

After the cancellation of Anderson's entry, and *after Bladow's filing upon the land had been allowed, to-wit, on June 15, 1891*, plaintiff in error made proof of its mortgage in the Interior Department, and moved that patent be issued to it under Section 7, Act of Congress March 3, 1891 (26 St. 1095), which motion was denied by both the Commissioner of the General Land Office and the Secretary of the Interior. This motion was made *four years after the final cancellation of Anderson's entry and four years after the homestead entry of defendant in error, Bladow, had been allowed.*

Plaintiff in error specifies three errors in his

brief, first, that by virtue of Anderson's mortgage, 16
it acquired an interest in the land of which it could not be deprived without being made a party to the proceedings in the Land Department, served with notice and given an opportunity to be heard. Second, that the cancellatioa of Anderson's entry on the contest initiated by Bladow without notice to the plaintiff in error, was contrary to law, and 17
void. Third, that such cancellation being void, Anderson's entry was confirmed and patent should have been issued to the plaintiff in error upon his application therefor, under Section 7, of the Act of Congress, March 3, 1891, (26 St. 1095).

ARGUMENT. 18

That an entryman, under an entry, fraudulent in fact, acquires no vested property interests in the land entered as against the Government of the United States, is so well settled by decisions of this Court, that no authorities need be cited. That Anderson's entry was fraudulent in fact, is stipulated. 19

Under the Statutes of the State of North Dakota, of which this Court will take judicial notice, existing at the time when the mortgage of the plaintiff in error was given by Anderson, a mortgage of real estate gave to the mortgagee simply a lien upon such real estate and not a

20 property interest in it. Under such statutes, a mortgage of real estate conveys no title to, nor interest in the lands mortgaged. (Paragraph 4699 —4712, Revised Codes of North Dakota. A re-enactment of the same provisions from the Code of 1877).

21 A mortgage lien *is not an estate or interest in the land.*

(Power vs. Bowdle, 3 N. D. 107—111.)

This lien, like other equitable liens, is not an interest *in the land*, is neither a jus ad rem, nor a jus in re, but merely an encumbrance.

(1st Pomeroy's Equity Jurisprudence, 368, Page 503.)

22 Plaintiff in error took its mortgage with the knowledge of the law in this regard, as well as with knowledge of the law regarding fraudulent entries.

We believe the law to be well settled, that an honest entryman, whose entry is made in good faith, and who has complied with the re-
23 quirements of the law and the regulations of the Interior Department for the enforcement of that law obtains through his final receipt the equitable title to the land entered, and the Government of the United States simply holds the legal title in trust for him, pending the issuance of a patent, which is the Government's formal

deed of conveyance. Had Anderson's entry been 24
made in good faith, and had it not been fraudulent, a different question might be presented; but his entry being fraudulent ab initio, he obtained no rights whatever either in or to the land. The case of Bogan vs. Edinburgh Land Mortgage Company, 63 Fed. 192, cited by plaintiff in error, is one in which the entryman's 25
good faith is not questioned. He had simply failed to declare his intention to become a citizen of the United States, and this not fraudulently, but through ignorance. It is undoubted that where an entryman in good faith makes final proof to the satisfaction of the Register and Receiver of the Land Office, and receives 25
their final certificate, the honest entryman ac-
quires a vested equitable right to the land which can only be divested according to law.

(Johnson vs. Tousley, 13 Wall. 72–85.)

The Commissioner of the General Land Office may review and set aside the action or the Register and Receiver before the patent issues, where 27
their decision is induced by fraud, perjury or mistake, or results from an erroneous view of the law.

(Bogan vs. Mtg. Company, Supra and cases cited on page 194.)

But the supervisory power of the Commis-

sioner of the Land Office, or of the Secretary of Interior is not an arbitrary, unlimited or discretionery power, but a power that must be exercised according to law and not in violation or disregard of it. Where it is so exercised, and its exercise is not induced by fraud or mistake, the results it produces are sustained by the Court. Where its exercise has been induced by *fraudulent misrepresentations*, or by material mistake of fact, or where the power has been exercised in violation or disregard of the law, the results produced are uniformly so modified by the decrees of the Courts, that *those who are en titled, in equity to the titles to the lands, ultimately obtain them.*

(Bogan vs. Mtg. Company, Supra.)

This supervisory power was granted to these superior officers of the Interior Department for the very purpose, among other things, of preventing the securing of titles to the lands of the Government by fraud and for the purpose of correcting mistakes, both of fact and law, in relation to the disposition of such lands. It was no part of the intention of Congress in granting this supervisory power, to permit it to be used in furtherance of the perpetration of frauds. After the title has passed from the Government to an individual, the Courts of the country are all

open to anyone honestly aggrieved by errors in law in the conveyance of such lands by the Government or by the perpetration of fraud on the part of persons to whom such lands are conveyed. But the Courts of the United States and of the different states, are not open to litigants assuming to derive benefits from the fraudulent acts of the entryman and will not lend themselves to the indirect perpetration of fraud by so assisting claimants under fraudulent entries. It is the honest entryman whose rights both the Interior Department and the Courts are jealous of guarding. So the law has come to be settled that where the Government has parted with its title to lands to the wrong person, the right person may compel the conveyance of such lands to him upon showing, first, either the fraud or the mistake in law upon which the conveyance to the wrong person is based, and but for which such conveyance would not have been made, and, second, that he was entitled in equity and good conscience to a conveyance of the land to himself. It is not enough for him to show that the patent has been issued to the wrong person, but in addition to that he must show himself to be the right person entitled, in equity, to the title of which the patentee has either through fraud or mistake of law deprived him. In other

36 words, he must show a better title in equity than that of the patentee. This can never be done by persons claiming under entrymen, whose entries are fraudulent.

It is conceded by the plaintiff in error that its mortgage gave to it no better right to this land than Anderson, the mortgagor, obtained
37 through his fraudulent entry. It must be apparent that, as against the Government, Anderson obtained absolutely no right, title to, nor interest in the lands, either in law or in equity, by his entry. An entryman, making a fraudulent entry of public land acquires no vested right of property in it.

38 American Mortgage Company vs. Hopper, 64 Fed. 507.

U. S. vs. Peterson, 50 Fed. 507.

League vs. DeYoung, 11 Howard, 185.

Parsons vs. Venske, 164 U. S., 89.

Anderson's entry was fraudulent; the commissioner so found as a fact in the contest in
39 which he had jurisdiction. This Court cannot question that finding of fact. Plaintiff therefore, could acquire nothing but a lien upon whatever title Anderson had, *and he had none.*

In this case plaintiff in error could not be wronged or injured in any conceivable manner, unless the act of March 3, 1891, (26 St. 1095)

applies to this case, because every right of the 40
plaintiff in error depends upon its ability to show that the entry of Anderson was in fact made in good faith. It can make no difference whether that showing be made in the Interior Department, or in a court of competent jurisdiction; but, here plaintiff in error has come into a Court of competent jurisdiction and confessed by the 41
twenty-second statement of fact in the stipulation of facts, not only that it could not prove Anderson's entry valid, but that it was in fact fraudulent and void.

The refusal of the Land Office to grant plaintiff's motion for patent was right, first, because the entry of Anderson was *finally canceled and Bladow's entry was of record prior to the passage of the Act of March 3d, 1891.* 42
The final cancellation was made November 14th, 1887. Second, by the terms of Section 7 of that Act the patent *could not issue* if fraud on the part of the purchaser was found, or unless proof *satisfactory* to the Land Department of the sale or encumbrance be presented.

This Court has finally settled our first con- 43
tention in the case of Parsons vs. Venske, supra, in which the Court holds that the provisions of the Act of March 3d, 1891 (Chap. 561, 26 St. 1098) refers only to the existing entries, and

does not reach a case like the present, where the action of the Land Department in canceling the entry and restoring the land to the public domain took place before the passage of the act. As to the second contention: The motion was denied in the Land Department. This Court can not presume error in law to have been committed by the Land Office in the denial of this motion, when the denial *may* rest upon the grounds of the absence of material facts from the required proof. However that may be, this same question has been authoritatively settled in this jurisdiction in Mortgage Company vs. Hopper, 56 Fed. 74. That case is a well considered one, and we desire to call special attention to the opinion and the cases cited in it. In that case, the facts being almost identical with those in this, the Mortgage Company claimed the benefit of this Act of March 3d, 1891. The Court says "the protection of a bona fide purchaser relates to the legal title, or at least to such a right as is *completely determined.* So long as something remains to be done affecting the right, those purchasing do so at their own peril." True, the plaintiff relied upon the registers receipt, but as shown, this was not a finality, and the plaintiff knew it, or at least should have known it. The doctrine of bona fide purchaser is not ap-

plied to protect *an equity*, but to protect the 48
legal title against a prior equity by uniting with such legal title an equity arising from the payment of money and securing the conveyance without notice, and a clear conscience.

Boon vs. Chiles, 10 Peters 211.

Plaintiff's second assignment of error is, that the cancellation of Anderson's entry by the Com- 49
missioner of the General Land Office on the ex parte contest, initiated by Bladow without notice to plaintiff in error, was contrary to law, and void.

If all that plaintiff in error claims for the action of the Commissioner be conceded, such cancellation would not be void, but voidable 50
merely. It is conceded that the Commissioner had the power to make the cancellation, and it is only claimed that he could not make it arbitrarily, contrary to law or in disregard of the law. All this being true, his cancellation was good and valid as against both Anderson and the United States, and was, at most, only voidable as against plaintiff in error. Being voidable, and not void, the plaintiff in error could protect it- 51
self against such cancellation, in so far as it affected its rights only upon showing that the entry of Anderson was in fact valid. So long as it has conceded that this could not be done,

52 but that, on the contrary, the entry was fraudulent in fact, what wrong has the plaintiff in error suffered even if before its rights could be determined it was entitled to notice? It confesses itself entitled to no relief on the facts; then, how could injury be inflicted upon it, even if the course of the Commissioner be held erroneous?

53 But the course of the Commissioner was right. The plaintiff in error was not entitled to notice of the hearing of this contest. When plaintiff in error contends that Anderson had no interest in this land, or in the contest at the time the contest was initiated, it is in error, indeed. Anderson had executed and delivered a deed with full
54 covenants of warranty, among them being covenants of seizin and good title. He was liable to his grantee on those covenants. He was also liable to the plaintiff for the mortgage debt. No one else was responsible for its payment. So far as the record discloses, none of the persons who succeeded to Anderson's paper title assumed or
55 agreed to pay this debt, nor was it deducted from the purchase price of the land in any conveyance. Therefore, Anderson was the real party in interest. As to this feature of the case, the opinion of the Supreme Court of the State of North Dakota, which is here attacked as erroneous, is as able a brief as we can prepare.

If it were necessary to serve plaintiff in er- 56
ror with notice of the contest, it would have been equally necessary to serve Anderson's grantees, R. N. Ink and J. S. Ink, with such notice. Plaintiff in error, having simply a lien upon the land and not an interest in the land, stood in exactly the same position as would the county of Richland, or the State of North Dakota, if 57
taxes had been levied against the land, and the lien of such taxes attached to it under the Statutes of North Dakota. The lien of the plaintiff in error was of exactly the same character as the lien for taxes, although the one was created by contract and the other by operation of law. If the plaintiff in error, under its lien, had a 59
vested property interest in the land, so would the County and the State; yet, no one will contend that the State or the County would be a necessary party to the contest or need be served with process to enable the Interior Department to determine such rights, as they might have under their lien. A judgment creditor of Anderson's would have, under the Statutes of North Dakota, a lien, exactly similar in character to that of the 59
mortgage, yet we think it has never been contended that it is the duty of the Government, or of persons furnishing information to the Government in contest of entries of public lands, to

search the records in the several offices of the Register of Deeds, Auditor, Treasurer and Clerk of the State District Court, within the County in which the lands, affected by such contests, lie. It must be remembered that in contests of entries of public lands commenced after final proof has been made and patent certificate issued, the proceeding is not, like an ordinary contest, between the contestant and the entryman. The proceeding is between the Government of the United States and the entryman, upon information filed by the contestant. The contestant is not a party in interest, and need not even be a person competent to take an interest in the lands. An alien may furnish this information as well as a citizen. The person furnishing the information owes no duties to other persons interested in the land. He simply sets the Government in motion. The parties in interest in such proceeding are the Government and the entryman whose entry is attacked. It may be that in a case of bona fide entry and the conveyance of the land to innocent parties by deed passing title, notice should be given by the Government to the entryman's grantees, for in such case the entryman would have a vested interest in the land, which he might convey by deed; but, in case of fraudulent entries canceled prior to the passage

of the Act of March 3, 1891, even the grantee 64
under a deed made by the entryman has no
vested property interest in the land, such as to
entitle him to notice of proceedings in the land
department, looking to the cancellation of the
entry. The legal title had, at all times, re-
mained in the Government, the equitable title
never passes unless the entry is bona fide. The 65
idea of basing an equitable title upon a fraudu-
lent entry is too anomalous to require discus-
sion.

The third assignment by plaintiff in error has been disposed of adversely to its contention in the case of Parsons vs. Venske, supra.

Plaintiff in error contends that Anderson had 66
the legal right to mortgage the land, and the
mortgagee had the legal right to accept the
mortgage. If one person have the legal right
to mortgage lands belonging to another, and to
which the mortgagor has no right or title, then
the contention of plaintiff in error may be true.
But conceding its premises, the conclusion of the 67
plaintiff in error that it must follow as a mat-
ter of course that the mortgagee had a property
right in the land does not necessarily follow.
The mortgagee could get no greater right to or
interest in the land than Anderson had. Ander-
son had absolutely none. Plaintiff in error, when

it took its mortgage, simply got title to the paper mortgage; that was all Anderson had to give.

Plaintiff in error argues that the contest was initiated by Bladow surreptitiously, and with intent to defraud the plaintiff in error. The record does not justify this argument. All the proceedings, with the exception of the final proof of Anderson, were in perfect good faith, and the record so shows. Bladow, when the contest was initiated, had whatever interest in the land Anderson had to convey and no more. In addition to this he had the warranties of his grantors to which he might have recourse when Anderson's title failed, but it must be clear that he was not bound to sit idly by and see Anderson's entry of the land canceled and rely solely upon these warranties. Anderson had conveyed no title to Bladow, but Bladow had in no way bound himself not to procure title to the land from other sources in case of the failure of Anderson's apparent rights to it. He had as much right to obtain the title from the government, as he would have had to obtain an outstanding title from any other party, and this right carried with it the other right to proceed to obtain that title in the manner prescribed by the laws of the United States and the rules of the

Department of Interior. The record dis- 72
closes continual residence upon and improvement of the lands by Bladow and the erection thereon of permanent improvements of great value. (Finding of Fact 20, page 11, Abstract.)

Reduced to its simplest form, the contention of plaintiff in error is contained in folios 55, 56 and 57 of his brief, and is in effect that the 73
cancellation of Anderson's entry was void as to plaintiff in error, and that under the Act of March 3, 1891, the land should have been patented to plaintiff in error. It is enough to say of this contention that since this Court has held that that Act does not apply to a case like this, where Anderson's entry was finally cancelled and 74
the land restored to the public domain, prior to the passage of the Act, and since without the application of this Act plaintiff in error could have no rights except such as would be dependent upon proof of the good faith and validity of Anderson's entry, which proof it confesses in this Court, it could not make, no injury or in- 75
justice has resulted to plaintiff in error, whether it was entitled to notice in the contest or not.

Since the Act of March 3, 1891, does not and cannot apply to this case, the reasoning of the Supreme Court of the State of North Dakota in its decision in this case is impregnable.

76 The fact that no notice was served on the mortgagee did not render the cancellation a nullity as to the mortgagee. The Land Department has until a patent has been issued, complete control of the question whether it will cancel the entry. Its power is not dependent on jurisdiction over the person of anyone, as the authority of a Court
77 is. By the issue of a certificate it does not lose control over the land; such certificate is in effect no more than a statement that prima facie the person to whom it is issued appears to be entitled to a patent. Whether subsequent investigation will lead to a different conclusion is left unsettled, and whoever deals with the holder
78 of such certificate is chargeable with knowledge that the proceedings instituted to secure the legal title to the land from the Government are in fieri, and that the Land Department may at any time revoke the certificate, thus destroying the entryman's prima facie right to the patent. What proceedure it will adopt, what per-
79 sons it will notify, or whether it will proceed on notice at all or not, are matters within the discretion of the Department, so far as the mere matter of power is concerned, Congress not having prescribed any practice in such cases. No matter how arbitrarily the Land Department may act, its cancellation is not a mere nullity, but

such arbitrary action will, however, entitle the 80
entryman to a hearing in Court, and on this hearing, he will be allowed to show that as a matter of fact his entry was not fraudulent. But no such showing was made in this case. Indeed it is not claimed that the entry was not, in fact fraudulent.

The judgment in this case is right, and is 81
what, in equity and good conscience, ought to be the judgment in every similar case. We are not unmindful of the fact that if the debtor Anderson be insolvent, plaintiff in error has lost its money. So have hundreds of others who have invested in mortgages and tax certificates upon lands for which the patent certificates have eventually been can- 82
celed. It may be a hardship to the plaintiff in error, but the risk of this loss is one which it assumed when it dealt with the fraudulent entryman and the defendant in error has in no way contributed to, nor increased such risk. If, as stated, in the opinion of the case of Bogan vs. Mortgage Company, supra, it is the intention that the decrees of the Courts in these cases 83
shall vest the title to lands in those who are in equity and good conscience entitled to them, then this judgment is right and should be affirmed.

Respectfully submitted,

WM. H. STANDISH,

Attorney for Defendant in Error.

W. E. PURCELL,

Of Counsel for Defendant in Error.

GUARANTY SAVINGS BANK *v.* BLADOW.

ERROR TO THE FOURTH JUDICIAL DISTRICT COURT FOR RICHLAND COUNTY, NORTH DAKOTA.

No. 134. Submitted January 31, 1900. — Decided February 26, 1900.

The power to review and set aside the action of local land officers exists in the general land department.

When an entry is cancelled, after due notice to the entryman, and after a hearing in the case, it is conclusive against him everywhere, upon all questions of fact; and it cannot be regarded as a mere nullity, when set up against his mortgagee, even though such mortgagee had no notice of the proceeding to cancel the certificate.

Such an entry does not transfer the title to the land, but simply furnishes *prima facie* evidence of an equitable claim for a patent, and the use of the certificate for that purpose is subject to be destroyed by its official cancellation.

THIS action was brought to foreclose a mortgage, owned by the plaintiff in error, upon certain land in North Dakota which the defendant in error claimed was his, and not subject to the lien of the mortgage. It was brought in the proper state

court, and the trial resulted in a judgment in favor of the defendant, declaring him to be the owner of the land; that the mortgage of the plaintiff in error was no lien upon it, and that it should be cancelled as an apparent cloud upon the title of the defendant.

The plaintiff appealed from this judgment to the Supreme Court of the State, where it was affirmed, 6 N. D. 108; 69 N. W. Rep. 41, and the case was brought here on writ of error.

The material facts are as follows: On January 6, 1881, one Anderson filed in the proper land office at Fargo, in the then Territory of Dakota, his homestead application to enter the land which is involved in this action. On July 20, 1881, he appeared before the register and receiver, and, under section 2301, Revised Statutes, commuting his homestead to a preëmption entry, made final proof of his claim, which was allowed and a final certificate issued, which was filed in the office of the register of deeds of the proper county on July 25, 1881. After the filing of proof, and on July 20, 1881, Anderson mortgaged the land to one H. E. Fletcher, who on June 20, 1882, assigned the mortgage to the plaintiff. Both the mortgagee and the assignee acted in good faith, and each instrument was executed for a valuable consideration.

On May 8, 1882, Anderson conveyed the land to one R. M. Ink, who on April 7, 1883, conveyed the same to one J. S. Ink, and on January 6, 1885, J. S. Ink conveyed the premises to the defendant.

All of the above were warranty deeds and duly recorded.

On March 14, 1882, after the final proof had been made by Anderson and passed upon by the register and receiver of the land office, and the record had been transmitted to the General Land Office at Washington, the Commissioner held the entry of Anderson upon said land, and directed the register and receiver of the local land office to hold the entry for cancellation, upon the ground that the testimony in the final proof made by Anderson for the land in question was evasive and failed to show six months' residence.

On January 22, 1886, the defendant filed in the land office at Fargo his application and affidavit to contest the entry of

Anderson upon the land on the ground that the proof furnished by Anderson upon that entry was false and that the entry was fraudulent, and in that affidavit he set forth that Anderson had never established his residence upon the land and had never resided thereon and never made the same his home as provided by the homestead laws of the United States.

The Commissioner of the General Land Office thereupon ordered a hearing before the register and receiver at Fargo between the defendant and Anderson as to the truth of the allegations in defendant's affidavit and application for contest. Due notice of the hearing was given to Anderson by publication, in accordance with an order of the register, which was granted upon an affidavit that personal service could not be made upon him.

At such hearing the defendant appeared with his witnesses and gave evidence tending to establish the truth of the allegations in his affidavit of contest, but no appearance was made or testimony offered by Anderson, and after the hearing the evidence taken thereon was transmitted to the Commissioner of the General Land Office at Washington, who, on the 14th day of November, 1887, directed the entry of Anderson to be cancelled as a fraudulent entry, which the register and receiver of the land office at Fargo thereafter did, and the entry was duly cancelled of record as a fraudulent entry, and the defendant was notified thereof. From this decision Anderson took no appeal.

After the final decision of the Commissioner of the General Land Office upon the contest and after the cancellation of the entry of Anderson, the defendant made his homestead entry upon the land, and on the 26th of April, 1893, submitted his final proof therefor, which was passed upon by the register and receiver and placed of record on that date, and a final certificate in due form was then issued to him by the register and receiver, and thereafter, on July 6, 1893, the government issued to him a patent for the land, which was recorded on October 25, 1893.

No notice of the cancellation of the homestead entry and certificate of Anderson was ever given to H. E. Fletcher,

the mortgagee, or to the plaintiff herein, his assignee, and the cancellation was made without actual notice of the decision of the Commissioner of the General Land Office to either Fletcher or the plaintiff, and neither Fletcher nor the plaintiff was served with any notice of the contest of defendant involving the land, nor was either made a party defendant in that contest.

After the cancellation and on June 15, 1891, plaintiff filed in the United States land office at Fargo proof of its interest as assignee of the mortgage, and moved that a patent be issued under the provisions of section 7 of the act of March 3, 1891, c. 561, 26 Stat. 1095, 1098, which motion was denied by the Commissioner of the General Land Office on August 13, 1891, and on appeal, by the Secretary of the Interior on July 15, 1892.

The notes secured by the mortgage, not having been paid, this action was brought to foreclose the same, and the defendant set up as a defence the facts in relation to the entry of Anderson and its cancellation and the issuing of the patent to him as above set forth.

Mr. S. B. Pinney, *Mr. F. B. Morrill* and *Mr. Edward Engerud*, for plaintiff in error.

Mr. W. H. Standish and *Mr. W. E. Purcell* for defendant in error.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

When Anderson obtained the decision of the register and receiver upon his application for the land it was subject to the power of the land department to review the judgment of those officers, and, upon facts showing that the entry was fraudulent, the department had power to cancel it. This could be done upon the same evidence which was before the register and receiver, and at least, upon notice to the party entering the land. Although the power to review and to cancel is not arbitrary or unlimited, and does not prevent

judicial inquiry in regard to its exercise, in some appropriate form, yet it is unquestionable that the power of reviewing and setting aside the action of the local land officers does exist in the general land department. *Orchard* v. *Alexander*, 157 U. S. 372, where many of the cases upon the subject are gathered in the opinion of the court.

In this case the Commissioner of the General Land Office at Washington held the entry of Anderson upon the land, and directed the register and receiver of the local office to hold such entry for cancellation, upon the ground that the testimony in the final proof was evasive and failed to show six months' residence. Subsequently, and upon sufficient notice to him, the defendant contested the entry of Anderson as fraudulent, on the ground that the proof furnished by him to procure it was false; that Anderson had never established his residence upon the land, and never had, in fact, resided thereon, and had never made the same his home, as provided by the laws of the United States.

A hearing was had before the register and receiver at Fargo, due notice whereof was given to Anderson, who did not appear, and the evidence taken upon the hearing was transmitted to the Commissioner at Washington, who, on November 14, 1887, directed that the entry of Anderson upon the lands should be cancelled, and thereafter in the due and usual course of business the register and receiver of the local office at Fargo did cancel that entry of record.

If this were all no question could be raised in regard to the regularity and sufficiency of the proceedings which ended in the cancellation of Anderson's entry.

The difficulty, however, arises from the fact that before the entry was cancelled, and on July 20, 1881, Anderson mortgaged his interest in the land to Fletcher, the mortgagee, who subsequently, as stated, assigned the mortgage to the plaintiff in error. Through various mesne conveyances, the defendant on the 6th of January, 1885, became the owner of whatever interest Anderson had in the land by virtue of his above mentioned entry. Thereafter the defendant filed his papers for a contest as to the validity of the entry of Anderson, and although

Anderson was duly notified of the proceedings, neither Fletcher nor his assignee, the plaintiff in error, had any notice of the same. The plaintiff, therefore, contends that the whole proceeding in the General Land Office, including the hearing on the contest before the register and receiver at Fargo, was, so far as it was concerned, an absolute nullity, and the cancellation of Anderson's entry had in law no effect upon its claim to use the certificate as evidence of Anderson's right to a patent. In our opinion this contention is not well founded.

The favorable decision of the register and receiver of the local land office upon the claim of Anderson was, under the statute, reviewable by the officers of the General Land Office, and the officer of that department who directed the cancellation of the entry had by law jurisdiction to make that direction. The certificate was *prima facie* evidence of the right of the entryman to a patent, but the power rested with the land department, upon proper notice, to set it aside and cancel the entry, and thus take away from him that *prima facie* evidence. *United States* v. *Steenerson*, 4 U. S. App. 332; *American Mortgage Company* v. *Hopper*, 56 Fed. Rep. 67; *S. C.* on appeal, 29 U. S. App. 12. If the entry were cancelled arbitrarily, and without evidence or notice to him, it would not conclude him, and he would, notwithstanding the decision, have the right to show that his entry was valid, and that he was entitled to a patent. And when the entry has been cancelled upon due notice to the entryman and after a hearing in the case, so that the cancellation is conclusive against him everywhere upon all questions of fact, it cannot be regarded as a mere nullity, when set up against the mortgagee of the fraudulent entryman, even though such mortgagee had no notice of the proceeding to cancel the certificate. The cancellation of the entry being valid as against Anderson, it left him without the right to avail himself of it in any future claim he might make for a patent, and it left his mortgagee also without the right to use that entry as *prima facie* evidence of Anderson's claim. The mortgagee, as was remarked by the court below, had no vested right to use the certificate as *prima facie* evidence of the right of the entryman to a patent, and after

its cancellation the plaintiff in error could not so use it, because it had been validly extinguished and cancelled in a proceeding against the mortgagor, although the mortgagee had no notice of such proceeding.

This result follows by reason of the character of the entry, and of the certificate given thereon. It does not transfer the title to the land from the United States to the entryman, and it simply furnishes *prima facie* evidence of an equitable claim upon the Government for a patent, and the use of the certificate for that purpose is subject to be destroyed by the cancellation thereof under direction of the department. This is the legal effect of such certificates, and all who deal in them or found any right upon them must be held to do so with full knowledge of the character of such papers.

But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry, or from proceeding before a judicial tribunal, against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been cancelled. Had the mortgagee taken either of these courses, it might have demanded in the one case, upon proving the validity of the entry, that a patent should be issued to the mortgagor or his grantees, leaving the land subject to the lien of the mortgage, or if a patent had been issued, the mortgagee might then have demanded relief against the patentee upon proof of the validity of the entry, in a proceeding in court to hold him as trustee. Although the mortgagee might have taken either of the courses above suggested, (and perhaps others,) it took neither of them. It relied on the absolute nullity of the cancellation and proceeded to foreclose the mortgage as if the certificate still subsisted and was evidence of the validity of the entry. This was a conclusion not well founded.

Opinion of the Court.

If the plaintiff in error, even in this foreclosure suit, had alleged that the entry had been cancelled and that a patent for the land had been thereafter issued to the defendant, and had asked that the patent so issued to him should be held by him in trust and as security for the payment of the plaintiff's mortgage on the ground that the entry had been improperly cancelled as to it, and had proved on the trial that Anderson's entry was legal, it may be that it would have been entitled to a judgment decreeing the defendant a trustee of the title under his patent from the government and providing for the sale of the land in order to pay the mortgage, or some other appropriate relief might have been granted. But this was not done, and the case must be decided upon the record before us.

It is erroneous to state, however, that plaintiff in error has admitted the entry was fraudulent. The facts are that in the statement agreed upon by the parties it was admitted that in the contest and upon the evidence therein submitted the register and receiver of the local land office decided as a conclusion of fact that Anderson's entry was fraudulent. This is plainly no admission of the fact itself, and in no way is the plaintiff in error thereby precluded from showing that the entry was valid.

It is further contended that the defendant could not himself take the title of Anderson and then contest before the land department the validity of Anderson's entry, nor could he, having succeeded in obtaining the cancellation of such entry, himself take proceedings under the preëmption or homestead act to obtain the same land. Having procured the title of Anderson and then instituted the contest in the land department, notice of which was given solely to Anderson, it is contended that Anderson had no longer any interest in defending his entry, and that the defendant occupied the position of being the only party to both sides of the contest, and could not therefore be permitted, after securing the cancellation, to himself make an entry and obtain a patent for the land; that by reason of these facts the cancellation was as to the mortgagee an absolute nullity, and the mortgagee could maintain its action to foreclose and sell the land under its

judgment of foreclosure the same as if no cancellation had taken place.

But it must be remembered that Anderson was a grantor of the land upon a warranty of title, and it is not clear he had no interest in supporting his right of entry as valid and sufficient. Ink had himself conveyed with warranty. Whether the defendant could avail himself of the warranty under the facts regarding his own action in being a mover in the proceeding to cancel the entry, might be doubtful; but, at any rate, there was a question which might cause Anderson to endeavor to uphold his entry. It will be remembered, too, that nearly three years prior to the conveyance to the defendant the Commissioner had held Anderson's entry for cancellation on account of fraud. The defendant thus stood in danger of a cancellation of that entry without notice to him, and, if an entry were then made by some one else, the defendant would be without right to thereafter make an entry for himself. Could he not anticipate that danger, and himself commence the contest?

As a mere grantee by deed, which conveyed the interest of Anderson, the defendant did not take title under him, within the meaning of the rule, which prevents one who takes title under another from questioning that other's title; like a tenant taking under his landlord. A simple grantee in a deed can set up another title in a third party, and can himself claim title under such party and can deny the title of his grantor. He takes no title under the grantor, and is at full liberty to deny the title of the latter.

When the defendant, therefore, took his conveyance from Ink, it may be assumed that he took all the title which came through Ink from Anderson, but he was under no obligation to Anderson or to his mortgagees to admit the validity of Anderson's entry, and had the right to deny its validity and to make a contest before the land department. The only objection to be urged against his proceeding is that he gave no notice of the contest to the mortgagee. But it was not the duty of the defendant to direct who should have notice in such contest, for that was a matter for the officials of the

department, before whom the contest was inaugurated, to decide. It was for them to determine who, if any one, should be notified of the contest, and the duty was not imposed upon the defendant. Of course, he could give notice if he chose. If he did not, the person who had any rights, if not notified at all, either by him or by the department, could not be concluded by the decision of the contest, and we hold now that the mortgagee was not thereby concluded, and had the right, if possible, to subsequently show that Anderson's entry was valid. But the cancellation of the entry and certificate was not rendered a nullity because the mortgagee had no notice.

The character of the proceeding before the department must be kept in mind. It is not like a proceeding in court. It is administrative in its nature, and when the proceedings are conducted in accordance with the provisions of law creating the department and giving it jurisdiction, they may be upheld, and the decisions of the officers supported when not made arbitrarily and without evidence.

If the defendant in inaugurating his contest were guilty of any fraud, by means of which notice to the mortgagee was omitted, or Anderson induced not to defend his entry, and the defendant was thus enabled to procure a decision as to the fraudulent character of that entry, it might perhaps be that in such case the mortagee would have the right to make use of the original entry as still *prima facie* evidence of Anderson's right to a patent, the same as if the certificate had not been cancelled. But there is no allegation of those facts in the bill nor is there any proof in this record which would sustain them if they had been alleged. The action is not brought for that purpose nor upon any such theory. Unless the facts that the defendant had taken this conveyance of Anderson's interest, and had subsequently commenced the proceedings for a contest in regard to the entry of the latter, of which the mortgagee had no notice, amount in law to a fraud by the defendant upon such mortgagee, which nullifies those proceedings and leaves the entry the same as if it had not in fact been cancelled, then the cancellation made after notice to Anderson was valid, and it deprived the

mortgagee of the use of the certificate as evidence of Anderson's right to the patent, while not in any way interfering with the mortgagee's right to prove it by other evidence. In our opinion the facts stated do not prove fraud, as a legal conclusion, on the part of the defendant, who had the right to take the proceedings he did.

Plaintiff in error also contends that the motion made by it on June 15, 1891, for the issuing of a patent to it, as a *bona fide* incumbrancer of the land, under the provisions of section 7 of the act of March 3, 1891, entitled "An act for the repeal of the timber culture law, and for other purposes," 26 Stat. 1095, 1098, should have been granted.

It will be seen that at the date of the passage of this act the entry of Anderson no longer existed, because on November 14, 1887, it had been cancelled. The case of *Parsons* v. *Venzke*, 164 U. S. 89, decides that the act of 1891 applies only to entries existing at the time of its passage. The claim of the plaintiff in error that the cancellation was wholly void for all purposes cannot, as we have seen, be supported.

Our conclusion upon the whole case is that the cancellation of the entry was valid as regards Anderson, and that the effect of such cancellation was to prevent the plaintiff in error from using the entry as *prima facie* evidence of the right of Anderson to a patent, and under the pleadings the plaintiff in error had no right to a judgment of foreclosure. As the case was not brought or tried on the theory that the defendant had only the legal title to the land under his patent, and that such patent should be decreed to be held by him in trust for the plaintiff to the extent of its mortgage because the entry of Anderson was in fact valid and proper, the plaintiff in error ought not to be obstructed in the pursuit of any remedy which it may be advised it is proper to take, by the use of the judgment herein as a conclusive adjudication against it.

We, therefore, think it proper to modify the judgment by striking out that portion which cancels the mortgage, and as modified, affirming the same without prejudice to the right of the mortgagee to seek such other relief as it may be advised, notwithstanding the adjudication of this judgment, and it is so ordered.